FAR EAST HOLDINGS BHD & ANOR v. MAJLIS UGAMA ISLAM DAN ADAT RESAM MELAYU PAHANG & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI AHMAD MAKINUDIN PCA
RAMLY ALI FCJ
AZAHAR MOHAMED FCJ
ZAHARAH IBRAHIM FCJ
JEFFREY TAN FCJ
[CIVIL APPEALS NO: 02-19-04-2016(W), 02(f)-20-04-2016(W) & 02(f)-21-04-2016(W)]
15 NOVEMBER 2017

ARBITRATION: *Agreement – Construction – Strict construction – Whether court to adopt plain and ordinary meaning – Whether agreement clear and unambiguous – Whether arbitrator right in construction of agreement – Whether 'questions of law arising out of the award' merited court's intervention under s. 42 of Arbitration Act 2005*

ARBITRATION: *Award – Grounds for setting aside award – Applicable test for court's intervention – Whether common law test of 'error on the face of award' applicable under Arbitration Act 2005 ('AA 2005') – Whether tests used under Arbitration Act 1952 applicable – Whether court's intervention only where so provided under AA 2005 – Whether AA 2005 contemplates minimal intervention – Whether court could intervene only in manner prescribed by Model Law – Arbitration Act 2005, s. 42*

ARBITRATION: *Award – Question of law – Reference under s. 42(1) of Arbitration Act 2005 – Whether party may only refer 'any question of law arising out of an award' – 'Question of law' – Whether defined – Whether s. 42 only permits reference on discrete question of law – Whether parties bound by findings of fact by arbitrator – Whether court has jurisdiction to deal with questions of fact – Arbitration Act 2005, s. 42*

ARBITRATION: *Arbitrator – Jurisdiction – Question of law – Reference under s. 42(1) of Arbitration Act 2005 – Whether arbitrator remains master of facts – Whether party may only refer 'any question of law arising out of an award' – 'Question of law' – Whether defined – Whether s. 42 only permits reference on discrete question of law – Whether parties bound by findings of fact by arbitrator – Whether court has jurisdiction to deal with questions of fact – Arbitration Act 2005, s. 42*

The respondent ('Majlis') was a body corporate established under s. 4 of the Administration of Islamic Law Enactment 1991. Far East Holdings Bhd ('Far East') was a public listed company wholly or substantially owned by the Government of the State of Pahang. Kampong Aur Oil Palm Sdn Bhd ('KAOP') was a wholly owned subsidiary of Far East. On 29 January 1985, the State Authority approved the alienation of 11,073 acres of land ('land')

to Majlis for the cultivation of commercial crops. Thereafter, Majlis entered into negotiations with Far East and KAOP to cultivate the said land. On 16 January 1992, all three parties entered into an agreement ('agreement') to develop the land into an oil palm plantation. It was provided in the agreement that the land would be developed by a wholly owned subsidiary of KAOP, Madah Perkasa Sdn Bhd ('Madah Perkasa') and that Majlis would transfer the land to the said subsidiary of KAOP. On 13 April 1999, Majlis transferred the said land to Madah Perkasa in consideration of 8,218,033 less 201,650 shares (there was a deduction of 201,650 shares for non-payment of RM201,650 towards the premium and quit rent of the said land, pursuant to cl. 2.01(d)) at the nominal value of RM1.33 per share. Majlis contended that: (i) clause 2.02(a) provided that with allotment of 8,218,033 shares to Majlis, the issued share capital of KAOP would be held in the proportion of 33% (8,218,033 shares) to Majlis and 67% (16,685,099 shares) to Far East; (ii) clause 2.02(b) provided an option ('first option') to Majlis to purchase a further 3,984,501 shares at RM1.33 per share from Far East; (iii) clause 2.02(c) provided that the first option was binding on Far East for a period of two years 'from the date of the receipt of the approvals by the shareholders of Far East through Extraordinary Meeting, Foreign Investment Committee relating to this joint venture and the Majlis Mesyuarat Kerajaan Negeri relating to the approval of transfer of the land to the Developer Company (whichever the later)'; (iv) clause 2.02(b) provided that with the exercise of the first option, Majlis would hold a further 16% of the issued share capital of KAOP; (v) clause 2.02(e) provided for a further option ('second option') to Majlis to purchase a further 11% of the issued share capital of KAOP from Far East; (vi) clause 2.02(f) provided that the second option shall be binding on Far East for three years starting and effective from the fifth year after the approvals mentioned in cl. 2.02(c) obtained. Subsequently, dispute arose between the parties. According to Far East and KAOP, Far East had extended loans totalling RM22,096,868 to KAOP to finance the development of the said land. In 1998, KAOP capitalised those loans as paid up capital and allotted 22,096,868 shares to Far East who consequently held 38,781,967 shares (16,685,099 + 22,096,868). But in the result, the allotment of 8,218,033 shares to Majlis would only amount to 17.5% and not 33% equity of KAOP. Because Far East held 38,781,967 plus 201,650 (there was an increase of 201,650 shares to Far East for payment of the premium and quit rent of the said land) out of a total of 47,000,000 shares, Majlis contended that the exercise of the two options to purchase shares from Far East would not give Majlis control, let alone 60% control, of KAOP.

In its statement of claim in the arbitration proceedings, Majlis pleaded that: (i) in 1998, Far East unlawfully increased the paid up capital of KAOP by 22,096,868 shares; (ii) Far East failed to transfer the said 16% to Majlis despite exercise of the first option; (iii) Far East failed to fix a price for the said 11% despite exercise of the second option; (iv) Far East unilaterally fixed the price of the said 11% at the exorbitant price of RM5.50 per share;

(v) Far East diluted the interest of Majlis in KAOP; and (vi) Far East breached the agreement which provided that Majlis would ultimately own 60% of the equity of KAOP. The arbitrator granted the claim by Majlis against Far East and KAOP. Further to the award and pursuant to s. 42 of the Arbitration Act 2005 ('AA 2005'), Far East and KAOP referred 18 'questions of law arising out of the award' to the High Court. Meanwhile, pursuant to s. 38 of AA 2005, Majlis applied to the High Court for recognition and enforcement of the award. The High Court, despite holding that 'there were no questions of law that merit intervention... under s. 42', set aside the pre and post-award interest awarded by the arbitrator. All the parties appealed to the Court of Appeal wherein the appeals were dismissed. Hence, the parties obtained leave to respectively raise the following 'questions of law' to this court: (i) whether the approach under the Arbitration Act 1952 (repealed) ('AA 1952') of a distinction between a general reference and a specific reference and that there could be no reference over an error of law under a specific reference, is applicable under the provisions of the AA 2005; (ii) whether the test of 'illegality' stated in the *Government of India v. Cairn Energy India Pte Ltd & Anor* or the test of 'patent injustice' stated in *AJWA For Food Industries Co. (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Anor Appeal* or the test of 'manifestly unlawful and unconscionable' and/or 'a perverse decision' in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* were the applicable tests under s. 42(1) and (1A) of the AA 2005; (iii) whether by the application of the correct test for review under s. 42(1) and (1A) of the AA 2005, the decision in the present case on the issues of the capital increase, the two options and the damage award were sustainable; (iv) whether under or in proceedings under the AA 2005, the arbitrator has the jurisdiction to award pre-award interest; (v) whether the arbitrator has the jurisdiction to award pre-award and post award interests when it is not specifically pleaded; (vi) whether the arbitrator has the power to award pre-award and post award interests under the general relief, 'all further and/or incidental relief which are appropriate under the circumstances of the present case to be awarded to the claimant'; and (vii) whether the court could interfere with the discretionary power of the arbitrator to award pre-award and post award interests.

Held (dismissing all three appeals with costs and varying award)
Per Jeffrey Tan FCJ delivering the judgment of the court:

(1) Under the AA 1952, there are two grounds for the court's intervention namely, under the common law where there is an error of law on the face of an award and for misconduct by an arbitrator under s. 24(2) of the Act. However, the provisions of AA 1952 are not applicable under the AA 2005. The AA 2005 which was based on the Model Law on International Commercial Arbitration ('Model Law') reformed the law relating to domestic arbitration and provided for international arbitration, the recognition and enforcement of awards and for related matters. (paras 93-96 & 109)

(2) The court disagreed with the statement that 'under the previous s. 24 of the repealed AA 1952, the test for setting aside awards under the section was whether an error of law on the face of the record arose'. 'Error of law on the face of the award' was the common law ground to set aside an award, whilst 'where an arbitrator or umpire has misconducted himself or the proceedings' was the statutory ground to set aside an award. Those two grounds, one under common law the other under AA 1952 could not be equated as the one and the same. With the radical change to the statutory regime, s. 24 of AA 1952 and the law developed thereunder are not relevant under s. 42 of the AA 2005. It would only follow that all decisions made under s. 42 but yet applied the law developed under s. 24 of AA 1952 and the decisions that followed them were wrongly decided on law and should not be followed. (para 110)

(3) Section 8 of the AA 2005 provides that 'no court shall intervene in matters governed by this Act, except where so provided in this Act' which is read to mean 'minimal intervention consistent with the policy underlying the UNCITRAL Model Law. Pertinent to 'where so provided in this Act', AA 2005 provides for the court intervention in the matters stated in ss. 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 and 46 of AA 2005. Where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the Model Law, and in the absence of any express provision the court must not intervene at all. (paras 111 & 114)

(4) Under s. 42(1), any party may refer to the High Court 'any question of law arising out of an award'. And under s. 42(1A) 'the High Court shall dismiss a reference made under sub-s. (1) unless the question of law substantially affects the rights of one or more of the parties.' Hence, the only ground for the court to intervene under s. 42 is when there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. (paras 117 & 118)

(5) There is no local authority on what is a 'question of law' in the context of s. 42. In the United Kingdom, an appeal on a question of law arising out of an award made in the proceedings 'shall not be brought except (a) with the agreement of all the other parties to the proceedings; or (b) with the leave of the court' (s. 69(2) of the UK Arbitration Act 1996). The right to appeal is also subject to the restrictions in s. 70(2) and (3) of the UK Arbitration Act 1996. The position in Singapore, Australia, New Zealand and Canada is no different. (paras 120 & 121)

(6) However, under s. 42 of the AA 2005, 'any party may refer to the High Court any question of law arising out of an award'. Leave of the court is not a prerequisite. Given that leave is not required, a s. 42

reference on 'any question of law arising out of an award' is akin to an appeal on 'a question of law arising out of an award' in the United Kingdom, Singapore, Australia, New Zealand or Canada. Given the similarity in substance between the two, appeals in those jurisdictions, as opposed to applications for leave, are clearly persuasive on the interpretation of 'question of law' and 'arising out of an award' in s. 42. (para 123)

(7) Pursuant to the AA 2005, the question of law must be one of law and not fact. However, there is no universal definition of 'question of law'. Based on the authorities, one of the following, which was not an exhaustive list, would meet the paradigm of 'any question of law' in s. 42: (i) a question of law in relation to matters falling within the second test of Mustill J's three-stage test in *The Chrysalis*; (ii) a question as to whether the decision of the tribunal was wrong; (iii) a question as to whether there was an error of law, and not an error of fact: error of law in the sense of an erroneous application of law; (iv) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another; (v) a question as to the correctness of the law applied; (vi) a question as to the correctness of the tests applied; (vii) a question concerning the legal effect to be given to an undisputed set of facts; (viii) a question as to whether the tribunal has jurisdiction to determine a particular matter; this may also come under s. 37 of the AA 2005; and (ix) a question of construction of a document.

(8) Where it is a question of fact, the arbitrators remain the masters of the facts. On an appeal, the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. In any event, s. 42 only permits a reference on a discrete question of law; there is no jurisdiction to deal with questions of fact. On the facts, the finding of the arbitrator that Majlis did not consent to the said allotment was a finding of fact. Far East and KAOP could not refer a question of law that was wholly reliant on a reversal of the fact found by the arbitrator. The finding of the arbitrator that limitation was not pleaded was also a finding of fact. Both questions were rightly rejected by the courts below. (paras 153, 155, 158 & 159)

(9) When the agreement was executed in 1992, Far East held 16,685,099 shares. But in 1998, Far East was allotted 22,096,868 shares that enlarged its holding to 38,781,967 shares. By reason of its payment of the premium and quit rent, Far East secured a further 151,616 shares, while Majlis was allotted less 201,650 shares pursuant to cl. 2.01(d). Clause 2.01(a) warranted that KAOP would allot 8,218,033 shares, which would represent 33% equity of KAOP, to Majlis. But,

8,218,033 shares would represent 33% equity of KAOP only if the holding of Far East in KAOP were to remain at 16,685,099 shares. Hence, the warranty of 33% equity could not be honoured and all other warranties in cls. 2.02(b), 2.02(d) and 2.02(e) could also not be honoured as a direct consequence of the allotment of 22,096,868 shares to Far East in 1998. (paras 167 & 168)

(10) KAOP was not at liberty, not after execution of the agreement, to capitalise whatever loans. KAOP and Far East warranted that the issue share capital of KAOP would stay put at 24,903,132 shares. Any capitalisation of loans would offend the warranty on the issued share capital of KAOP. Further, the finding of fact of the arbitrator was that there was no consent from Majlis to the capitalisation and allotment in 1998. In the circumstances, the 1998 allotment was in blatant breach and in total disregard of cls. 2.02(a), 2.02(b), 2012(d) and 2.02(e). (para 172)

(11) Exercise of the options to purchase the stated number of shares would not acquire for Majlis the said 16% and 11%. Far East and KAOP had upended cls. 2.02(b), 2.02(d), and 2.02(e) and rendered those clauses ineffectual to give control to Majlis even before the said land could be transferred to Madah Perkasa and before Majlis could exercise the options. Once the loans were capitalised in 1998, Majlis could no longer acquire the said 16% and 11% from Far East. Given that the options could not be honoured, it was most unfair to argue that the options were not exercised within time. (para 173)

(12) The agreement must be strictly construed. Only ordinary words were used in the agreement and therefore, a plain and ordinary meaning should be adopted. When given its plain and ordinary meaning, the agreement was clear and unambiguous. There was no error of law by the arbitrator in his construction of the agreement. The arbitrator was correct in law to strike down the 1998 allotment to enforce the agreement. The courts below were right to conclude that the 'questions of law arising out of the award' did not merit intervention under s. 42. (paras 164, 165, 174 & 175)

(13) Far East would have received *ultra vires* dividends of RM105,490,448 and the arbitrator should order Far East to give back RM105,490,448 to KAOP. But instead, the arbitrator ordered Far East to pay RM77,808,207.80 (RM97,692,957 less RM19,884,749.20) to Majlis as damages. By that latter devise, the *ultra vires* dividends that belonged to KAOP were 're-allocated' to Far East and Majlis. (para 182)

(14) The legitimate dividends would have been paid to Far East - 67.61%, and Majlis - 32.39% and not Far East - 40.61%, and Majlis - 59.39%. Being entitled to only 40.61% of 24,853,098 shares, Far East should give back all dividends received, beyond its 40.61%, to Majlis. Majlis

was entitled to 59.39% but would have been paid only 32.39% of the dividends paid to 24,853,098 shares. Majlis should be paid a further 27% of the dividends paid to 24,853,098 shares, which equates to 6,710,336 shares which in turn would have received RM32,035,144.10. Far East should restore RM32,035,144.10 that it received to Majlis. Conversely, Majlis should be ordered to pay the consideration payable on exercise of the options. A set-off would not offend s. 67(1) of the Companies Act 1965, as the dividends paid in proportion to 6,723,845 shares were not *ultra vires* dividends that should be returned to KAOP, but were dividends that should have been received by Majlis.

Bahasa Malaysia *Headnotes*

Responden ('Majlis') adalah badan korporat yang ditubuhkan bawah s. 4 Enakmen Pentadbiran Undang-Undang Islam 1991. Far East Holdings Bhd ('Far East') adalah syarikat senarai awam milik penuh atau secara substansial oleh Kerajaan Negeri Pahang. Kampong Aur Oil Palm Sdn Bhd ('KAOP') adalah anak syarikat milik penuh Far East. Pada 29 Januari 1985, Pihak Berkuasa Negeri meluluskan pemberian milik 11,073 ekar tanah ('tanah') kepada Majlis bagi penanaman tanaman komersial. Kemudian, Majlis memasuki perundingan dengan Far East dan KAOP untuk penanaman tanah tersebut. Pada 16 Januari 1992, ketiga-tiga pihak memeterai perjanjian ('perjanjian') untuk mengusahakan tanah tersebut menjadi ladang kelapa sawit. Perjanjian tersebut memperuntukkan bahawa tanah tersebut akan diusahakan oleh anak syarikat milik penuh KAOP, Madah Perkasa Sdn Bhd ('Madah Perkasa') dan Majlis akan memindah milik tanah tersebut kepada Madah Perkasa. Pada 13 April 1999, Majlis memindah milik tanah tersebut kepada Madah Perkasa bagi balasan 8,218,033 kurang 201,650 saham (terdapat penolakan 201,650 saham atas kegagalan membayar RM201,650 bagi premium dan cukai tanah bagi tanah tersebut, menurut kl. 2.01(d)) pada nilai nominal RM1.33 sesaham. Majlis menghujahkan bahawa: (i) klausa 2.02(a) memperuntukkan bahawa dengan penguntukan 8,218,033 saham kepada Majlis, modal saham terbitan KAOP akan dipegang dalam pecahan 33% (8,218,033 saham) kepada Majlis dan 67% (16,685,099 saham) kepada Far East'; (ii) klausa 2.02(b) memperuntukkan opsyen ('opsyen pertama') kepada Majlis untuk membeli 3,984,501 saham lanjutan pada harga RM1.33 sesaham daripada Far East; (iii) klausa 2.02(c) memperuntukkan bahawa opsyen pertama mengikat Far East bagi tempoh dua tahun 'dari tarikh penerimaan kelulusan oleh pemegang-pemegang saham Far East melalui Mesyuarat Luar Biasa, Jawatankuasa Pelaburan Asing berkaitan dengan usahasama ini dan Majlis Mesyuarat Kerajaan Negeri berkaitan dengan kelulusan pindah milik tanah kepada Syarikat Pemaju (mana-mana yang terkemudian)'; (iv) klausa 2.02(b) memperuntukkan bahawa dengan pelaksanaan opsyen pertama, Majlis akan memegang selanjutnya 16% modal saham terbitan KAOP; (v) klausa 2.02(e) memperuntukkan opsyen selanjutnya ('opsyen kedua') kepada Majlis untuk membeli 11% lagi modal

saham terbitan KAOP daripada Far East; (vi) klausa 2.02(f) memperuntukkan opsyen kedua mengikat Far East bagi tiga tahun bermula dan berkuat kuasa dari tahun kelima selepas kelulusan-kelulusan dalam kl. 2.02(c) diperoleh. Kemudian, pertikaian timbul antara pihak-pihak. Menurut Far East dan KAOP, Far East telah memberikan pinjaman berjumlah RM22,096,868.00 kepada KAOP untuk membiayai pembangunan tanah tersebut. Dalam tahun 1998, KAOP memodalkan pinjaman tersebut sebagai modal berbayar dan menguntukkan 22,096,868 saham kepada Far East yang berikutan itu memegang 38,781,967 saham (16,685,099 + 22,096,868). Tetapi akibatnya, penguntukan 8,218,033 saham kepada Majlis akan hanya membentuk 17.5% dan bukan 33% ekuiti KAOP. Oleh sebab Far East memegang 38,781,967 ditambah 201,650 (terdapat penambahan 201,650 saham kepada Far East bagi bayaran premium dan cukai tanah bagi tanah tersebut) daripada jumlah keseluruhan 47,000,000 saham, Majlis menghujahkan bahawa pelaksanaan dua opsyen untuk membeli saham-saham daripada Far East tidak akan memberikan Majlis kawalan, mahupun 60% kawalan KAOP.

Dalam penyataan tuntutan prosiding timbang tara, Majlis menghujahkan bahawa: (i) pada 1998, Far East secara tidak sah meningkatkan modal berbayar KAOP dengan 22,096,868 saham; (ii) Far East gagal memindah milik 16% tersebut kepada Majlis walaupun dengan pelaksanaan opsyen pertama; (iii) Far East gagal menetapkan harga bagi 11% tersebut walaupun dengan pelaksanaan opsyen kedua; (iv) Far East secara satu pihak menetapkan 11% tersebut pada harga yang sangat tinggi iaitu RM5.50 sesaham; (v) Far East mencairkan kepentingan Majlis dalam KAOP; dan (vi) Far East melanggar perjanjian yang memperuntukkan bahawa Majlis akan pada akhirnya memiliki 60% ekuiti KAOP. Penimbang tara membenarkan tuntutan Majlis terhadap Far East dan KAOP. Lanjutan pada award dan menurut s. 42 Akta Timbang Tara 2005 ('Akta 2005'), Far East dan KAOP merujuk 18 'persoalan undang-undang berbangkit daripada award' kepada Mahkamah Tinggi. Sementara itu, menurut s. 38 Akta 2005, Majlis memohon kepada Mahkamah Tinggi untuk pengiktirafan dan penguatkuasaan award. Mahkamah Tinggi, walaupun memutuskan bahawa 'tiada persoalan undang-undang yang mewajarkan campur tangan ... bawah s. 42', mengetepikan faedah sebelum dan selepas award yang diawardkan oleh penimbang tara. Kesemua pihak merayu ke Mahkamah Rayuan di mana rayuan-rayuan tersebut ditolak. Dengan itu, pihak-pihak memperoleh kebenaran untuk masing-masing membangkitkan 'persoalan undang-undang' berikut kepada mahkamah ini: (i) sama ada pendekatan bawah Akta Timbang Tara 1952 ('Akta 1952') berkaitan perbezaan antara rujukan am dan rujukan spesifik dan tiada rujukan kekhilafan undang-undang bawah rujukan spesifik, diguna pakai bawah peruntukan Akta 2005; (ii) sama ada ujian 'ketaksahan' yang dinyatakan dalam kes *Government of India v. Cairn Energy India Pte Ltd & Anor* atau ujian 'ketidakadilan paten' yang dinyatakan dalam kes *AJWA For Food Industries Co. (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Anor Appeal*

atau ujian 'ketaksahan dan tidak berpatutan yang jelas' dan/atau 'keputusan berlawanan' dalam kes *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* adalah ujian yang diguna pakai dalam s. 42(1) and (1A) Akta 2005; (iii) sama ada dengan penggunaan ujian yang betul bagi semakan bawah s. 42(1) dan (1A) Akta 2005, keputusan dalam kes ini berkaitan isu penambahan modal, kedua-dua opsyen dan award ganti rugi boleh dikekalkan; (iv) sama ada bawah atau dalam prosiding bawah Akta 2005, penimbang tara berbidang kuasa untuk mengawardkan faedah sebelum award; (v) sama ada penimbang tara berbidang kuasa untuk mengawardkan faedah sebelum dan selepas award apabila ia tidak diplidkan secara spesifik; (vi) sama ada penimbang tara mempunyai kuasa untuk mengawardkan faedah sebelum dan selepas award bawah relief am, kesemua relief lanjutan dan/atau sampingan di mana sesuai bawah keadaan kes ini untuk diawardkan kepada penuntut'; dan (vii) sama ada mahkamah boleh campur tangan dengan kuasa sedia ada penimbang tara untuk mengawardkan faedah sebelum dan selepas award.

Diputuskan (menolak ketiga-tiga rayuan dengan kos dan mengubah award)

Oleh Jeffrey Tan HMP menyampaikan penghakiman mahkamah:

(1) Bawah Akta 1952, terdapat dua alasan bagi campur tangan mahkamah, iaitu, bawah common law di mana terdapat kekhilafan undang-undang secara zahir dan salah laku penimbang tara bawah s. 24(2) Akta tersebut. Walau bagaimanapun, peruntukan-peruntukan Akta 1952 tidak terpakai bawah Akta 2005. Akta 2005 yang berasaskan pada Model Law on International Commercial Arbitration ('Model Law') membaharui undang-undang berkaitan timbang tara domestik dan memperuntukkan bagi timbang tara antarabangsa, pengiktirafan dan penguatkuasaan award-award dan bagi perkara-perkara berkaitan dengannya.

(2) Mahkamah tidak bersetuju dengan kenyataan bahawa 'bawah s. 24 terdahulu Akta 1952, ujian untuk pengetepian award bawah seksyen tersebut adalah sama ada kekhilafan undang-undang secara zahir timbul'. 'Kekhilafan undang-undang secara zahir dalam award' adalah asas common law untuk mengetepikan award, sementara 'di mana penimbang tara atau pengadil tersalah laku dirinya atau prosiding' adalah alasan statutori untuk mengetepikan award. Kedua-dua alasan tersebut, satu bawah common law dan satu bawah AA 1952 tidak boleh disamakan sebagi satu dan serupa. Dengan perubahan radikal pada rejim statutori, s. 24 AA 1952 dan undang-undang yang berkembang di bawahnya tidak relevan bawah s. 42 Akta 2005. Berikutan itu, kesemua keputusan yang dibuat bawah s. 42 tetapi menggunakan undang-undang yang dikembangkan bawah s. 24 Akta 1952 dan keputusan di bawahnya diputuskan secara salah dari segi undang-undang dan tidak wajar diikuti.

(3) Seksyen 8 Akta 2005 memperuntukkan 'Melainkan jika diperuntukkan bawah Akta ini, tiada mahkamah boleh campur tangan dalam apa-apa perkara yang dikawal oleh Akta ini' yang bermaksud 'campur tangan minima konsisten dengan polisi bawah UNCITRAL Model Law. Berkaitan dengan 'melainkan jika diperuntukkan bawah Akta ini' membuat peruntukan bagi campur tangan mahkamah dalam perkara-perkara yang dinyatakan dalam ss. 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45 dan 46 Akta 2005. Apabila sesuatu pihak memohon campur tangan dalam salah satu situasi tersebut, mahkamah dibenarkan campur tangan hanya dalam cara yang dinyatakan dalam Model Law, dan tanpa apa-apa peruntukan jelas, mahkamah tidak patut campur tangan sama sekali.

(4) Bawah s. 42(1), mana-mana pihak boleh merujuk kepada Mahkamah Tinggi 'apa-apa persoalan undang-undang yang timbul daripada suatu award'. Dan bawah s. 42(1A) 'Mahkamah Tinggi hendaklan menolak suatu rujukan yang dibuat di bawah sub-s. (1) melainkan jika soalan undang-undang itu menjejaskan secara substansial hak satu pihak atau lebih.' Oleh itu, satu-satunya alasan untuk campur tangan mahkamah bawah s. 42 adalah apabila terdapat soalan undang-undang yang timbul daripada award yang menjejaskan hak suatu pihak atau lebih secara substansial.

(5) Tiada autoriti tempatan mengenai maksud 'soalan undang-undang' dalam konteks s. 42. Di United Kingdom, suatu rayuan atas soalan undang-undang yang timbul daripada award yang dibuat dalam prosiding 'tidak boleh dimulakan melainkan (a) dengan persetujuan kesemua pihak kepada prosiding; atau (b) dengan kebenaran mahkamah' (s. 69(2) UK Arbitration Act 1996). Hak merayu juga tertakluk pada sekatan dalam s. 70(2) dan (3) UK Arbitration Act 1996. Kedudukan di Singapura, Australia, New Zealand dan Kanada juga tiada bezanya.

(6) Tetapi, bawah s. 42 Akta 2005, 'mana-mana pihak boleh merujuk kepada Mahkamah Tinggi apa-apa soalan undang-undang yang timbul daripada award'. Kebenaran mahkamah bukan keperluan awal. Oleh sebab kebenaran tidak diperlukan, rujukan bawah s. 42 atas 'apa-apa soalan undang-undang yang timbul daripada award' adalah seakan-akan rayuan atas 'apa-apa soalan undang-undang yang timbul daripada award' di United Kingdom, Singapura, Australia, New Zealand atau Kanada. Disebabkan serupa secara besarnya antara kedua-duanya, rayuan-rayuan di bidang kuasa itu, berbanding dengan permohonan untuk kebenaran jelas berpengaruh dalam pentafsiran 'soalan undang-undang' dan 'timbul daripada award' dalam s. 42.

(7) Menurut Akta 2005, soalan undang-undang mestilah bersifat undang-undang dan bukan fakta. Walau bagaimanapun, tiada definisi sejagat bagi 'soalan undang-undang'. Berdasarkan autoriti, salah satu daripada

yang berikut, yang bukan senarai lengkap, akan menepati paradigm 'apa-apa soalan undang-undang' dalam s. 42: (i) soalan undang-undang berkaitan perkara-perkara yang terangkum dalam ujian kedua daripada ujian tiga peringkat Mustill J dalam kes *The Chrysalis*; (ii) soalan sama ada keputusan tribunal tersebut salah; (iii) soalan sama ada terdapat kekhilafan dari segi undang-undang, dan bukan kekhilafan fakta: kekhilafan undang-undang dari segi pemakaian undang-undang secara salah; (iv) soalan sama ada pemakaian undang-undang yang betul pasti menjurus pada satu jawapan dan tribunal memberikan jawapan yang lain; (v) soalan sama ada undang-undang yang betul digunakan; (vi) soalan mengenai kesan undang-undang yang perlu diberikan bagi set fakta yang tidak dipertikaikan; (viii) soalan sama ada ujian yang betul diguna pakai; (vii) soalan sama ada tribunal mempunyai bidang kuasa untuk menentukan sesuatu perkara; ini juga boleh termasuk dalam s. 37 Akta 2005; dan (ix) soalan pentafsiran dokumen.

(8) Di mana ia adalah soalan fakta, penimbang tara kekal penentu utama fakta. Atas rayuan mahkamah perlu memutuskan apa-apa soalan undang-undang yang timbul daripada award atas dasar penerimaan penuh dan tidak bersyarat, dapatan fakta penimbang tara. Pihak-pihak yang menyerahkan pertikaian mereka kepada timbang tara terikat oleh perjanjian untuk menerima award penimbang tara atas fakta. Walau bagaimanapun, s. 42 hanya membenarkan rujukan atas soalan undang-undang yang berasingan; tiada bidang kuasa untuk menangani soalan fakta. Atas fakta, dapatan penimbang tara bahawa Majlis tidak menyetujui penguntukan tersebut adalah dapatan fakta. Far East dan KAOP tidak boleh merujuk persoalan undang-undang yang bergantung sepenuhnya atas keterbalikan fakta yang didapati oleh penimbang tara. Dapatan penimbang tara bahawa had masa tidak diplidkan juga adalah dapatan fakta. Kedua-dua soalan ditolak dengan betul oleh mahkamah di bawah.

(9) Apabila perjanjian dimeterai dalam tahun 1992, Far East memegang 16, 685,099 saham. Tetapi dalam tahun 1998, Far East menguntukkan 22,096,868 saham yang meningkatkan pegangannya kepada 38,781,967 saham. Disebabkan oleh bayaran premium dan cukai tanah, Far East memperoleh lagi 151,616 saham, sementara Majlis diperuntukkan kurang 201,650 menurut kl. 2.01(d). Klausa 2.01 memberikan waranti bahawa KAOP akan menguntukkan 8,218,033 saham, yang mewakili 33% ekuiti KAOP, kepada Majlis. Tetapi, 8,218,033 saham akan hanya mewakili 33% ekuiti KAOP hanya jika pegangan Far East dalam KAOP kekal 16,685,099 saham. Oleh itu, waranti bahawa 33% ekuiti tidak boleh dipenuhi dan kesemua waranti lain dalam kl. 2.02(b), 2.02(d) dan 2.02(e) juga tidak boleh dipenuhi atas sebab langsung penguntukan 22,096,868 saham kepada Far East pada 1998.

(10) KAOP tidak bebas, selepas pemeteraian perjanjian, untuk memodalkan apa-apa pinjaman. KAOP dan Far East membuat waranti bahawa pengeluaran modal saham KAOP akan kekal pada 24,903,132 saham. Apa-apa pemodalan pinjaman akan melanggar waranti atas pengeluaran modal saham KAOP. Selanjutnya, dapatan fakta penimbang tara adalah bahawa tiada persetujuan daripada Majlis untuk pemodalan dan penguntukan pada 1998. Dalam keadaan tersebut, penguntukan 1998 adalah pelanggaran jelas dan ketidakendahan kl. 2.02(a), 2.02(b), 2012(d) dan 2.02(e).

(11) Pelaksanaan opsyen untuk membeli jumlah saham yang dinyatakan tidak akan memberikan Majlis 16% dan 11% tersebut. Far East dan KAOP telah menterbalikkan kl. 2.02(b), 2.02(d), dan 2.02(e) dan menyebabkan klausa-klausa tersebut tidak berkesan untuk memberikan kawalan kepada Majlis walau sebelum tanah tersebut boleh dipindahkan kepada Madah Perkasa dan sebelum Majlis boleh melaksanakan opsyen tersebut. Sebaik sahaja pinjaman tersebut dimodalkan pada 1998, Majlis tidak boleh lagi memperoleh 16% dan 11% daripada Far East. Memandangkan opsyen tersebut tidak boleh dilaksanakan, tidak adil untuk menghujahkan bahawa opsyen tersebut tidak dilaksanakan dalam tempoh had masa.

(12) Perjanjian mesti ditafsirkan secara ketat. Hanya perkataan-perkataan biasa digunakan dalam perjanjian tersebut dan oleh itu, maksud biasa dan lazim perlu diberikan. Apabila diberikan maksud biasa dan lazim, perjanjian tersebut jelas. Tiada kekhilafan undang-undang oleh penimbang tara dalam pentafsiran perjanjian tersebut. Penimbang tara betul dari segi undang-undang untuk membatalkan penguntukan pada 1998 untuk menguatkuasakan perjanjian. Mahkamah-mahkamah di bawah betul apabila memutuskan bahawa 'soalan undang-undang yang timbul daripada award' tidak mewajarkan campur tangan bawah s. 42.

(13) Far East akan menerima dividen *ultra vires* sejumlah RM105,490,448 dan penimbang tara sepatutnya memerintahkan Far East memulangkan sejumlah RM105,490,448.00 kepada KAOP. Tetapi sebaliknya, penimbang tara memerintahkan Far East membayar RM77,808,207.80 (RM97,692,957 kurang RM19,884,749.20) kepada Majlis sebagai ganti rugi. Melalui cara terkemudian itu, dividen *ultra vires* milik KAOP 'diperuntukkan semula' kepada Far East dan Majlis.

(14) Dividen-dividen sah yang dibayar adalah, kepada Far East - 67.61%, dan Majlis - 32.39%; dan bukan Far East - 40.61%, dan Majlis - 59.39%. Oleh sebab hanya berhak pada 40.61% daripada 24,853,098 saham, Far East sepatutnya memulangkan kesemua dividen yang diterima, melampaui 40.61% kepada Majlis. Majlis berhak menerima 59.39% tetapi hanya akan dibayar 32.39% dividen yang dibayar bagi 24,853,098 saham. Majlis sepatutnya dibayar 27% dividen lanjutan

yang dibayar bagi 24,853,098 saham yang menyamai 6,710,336 saham yang selanjutnya akan menerima RM32,035,144.10. Far East perlu mengembalikan RM32,035,144.10 yang diterimanya kepada Majlis. Sebaliknya, Majlis sepatutnya diperintahkan membayar balasan yang perlu dibayar atas pelaksanaan opsyen tersebut. Set-off tidak melanggar s. 67(1) Akta Syarikat 1965, kerana dividen-dividen yang dibayar sepadan dengan 6,723,845 saham bukan dividen *ultra vires* yang perlu dipulangkan kepada KAOP, tetapi dividen-dividen yang sepatutnya diterima oleh Majlis.

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C *(Civil Appeal No: 02(f)-19-04-2016(W) & 02(f)-20-04-2016(W))*
For the appellants - Cyrus Das, Lam Ko Luen, Lee Lyn-Ni & Nina Lai; M/s Shook Lin & Bok
For the respondent - Cecil Abraham, B Thangaraj, Syed Nasarudin, Sharifah Nurul Atiqah, R Archana & Syukran Syafiq; M/s Radzi & Abdullah

D *(Civil Appeal No: 02(f)-21-04-2016(W))*
For the appellant - Cecil Abraham, B Thangaraj, Syed Nasarudin, Sharifah Nurul Atiqah, R Archana & Syukran Syafiq; M/s Radzi & Abdullah
For the respondents - Cyrus Das, Lam Ko Luen, Lee Lyn-Ni & Nina Lai; M/s Shook Lin & Bok

E *[Editor's note: For the Court of Appeal judgment, please see Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Another Appeal [2015] 8 CLJ 58 (varied).]*

Reported by S Barathi

JUDGMENT

F **Jeffrey Tan FCJ:**

[1] These three related appeals arose from a domestic arbitral award (award) dated 19 September 2012, as amended by a corrective award dated 11 October 2012, of a single arbitrator who granted the claim of the Majlis G Ugama Islam dan Adat Resam Melayu Pahang (Majlis) against Far East Holdings Bhd (Far East) and Kampong Aur Oil Palm Sdn Bhd (KAOP).

[2] Further to the award and pursuant to s. 42 (s. 42) of the Arbitration Act 2005 (AA 2005), Far East and KAOP referred 18 "questions of law arising out of the award" to the High Court. Meanwhile, pursuant to s. 38 H of AA 2005, Majlis applied to the High Court for recognition and enforcement of the award. On 31 March 2014, the High Court held that "there were no questions of law that merit intervention ... under s. 42". Despite so, the High Court set aside the pre and post-award interest awarded by the arbitrator. All parties appealed. The Court of Appeal dismissed all I three appeals (see *Far East Holdings Bhd & Anor v. Majlis Ugama Islam Dan Adat Resam Melayu Pahang & Another Appeal* [2015] 8 CLJ 58; [2015] 4 MLJ 766). Thereafter, all parties obtained leave to respectively raise the following 'questions of law' (leave questions) to this court:

Civil Appeals 02-19-04-2016 and 02-20-04-2016

a) Whether the approach under the Arbitration Act 1952 (repealed) of a distinction between a general reference and a specific reference (see *Sharikat Permborong Pertanian & Perumahan v. Federal Land Development Authority* [1969] 1 LNS 172; [1971] 2 MLJ 210), and that there could be no reference over an error of law under a specific reference, is applicable under the provisions of the Arbitration Act 2005?

b) Whether the test of 'illegality' stated in the *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 or the test of 'patent injustice' stated in *AJWA For Food Industries Co. (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395 or the test of 'manifestly unlawful and unconscionable' and/or 'a perverse decision' in *Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 are applicable tests under s. 42(1) and (1A) of the Arbitration Act 2005?

c) Whether by the application of the correct test for review under s. 42(1) and (1A) of the Arbitration Act 2005, the decision in the present case on the issues of the capital increase, the two options and the damage award are sustainable?

Civil Appeal 02-21-04-2016

a) Whether under or in proceedings under the Arbitration Act 2005, the arbitrator has the jurisdiction to award pre-award interest?

b) Whether the arbitrator has the jurisdiction to award pre-award and post-award interests when it is not specifically pleaded?

c) Whether the arbitrator has the power to award pre-award and post-award interests under the general relief, "all further and/or incidental reliefs which are appropriate under the circumstances of the present case to be awarded to the claimant?"

d) Whether the court can interfere with the discretionary power of the arbitrator to award pre-award and post-award interests?

Background Facts

[3] In Appeals 02-19-04-2016 and 02-20-04-2016, Far East and KAOP are the appellants while Majlis is the respondent. In Appeal 02-21-04-2016, Majlis is the appellant, while Far East and KAOP are the respondents. For ease of reference, we would refer to the parties as Far East, KAOP and or Majlis.

[4] Majlis is a body corporate established under s. 4 of the Administration of Islamic Law Enactment 1991 (Enactment). Far East is a public listed company wholly or substantially owned by the Government of the State of Pahang. KAOP is a wholly-owned subsidiary of Far East.

[5] On 29 January 1985, the State Authority approved the alienation of 11,073 acres of land (said land) to Majlis for the cultivation of commercial crops. Thereafter, Majlis entered into negotiations with Far East and KAOP to cultivate the said land. On 16 January 1992, all three parties entered into an agreement (agreement) to develop the said land into an oil palm plantation. *Inter alia*, the agreement provided that the said land would be so developed by a wholly-owned subsidiary of KAOP, and that Majlis would transfer the said land to the said subsidiary of KAOP.

[6] Clause 2.01 of the agreement (the clauses of the agreement would henceforth be referred as clause/sub-clause) thus stipulated the monetary value of the said land:

> All the three parties in this agreement agree and accept that the value of the said Land is Ringgit: TWO THOUSAND FOUR HUNDRED AND THIRTY NINE AND SEVEN CENTS (RM2,439-07) only per hectare or Ringgit: NINE HUNDRED EIGHTY SEVEN AND EIGHT CENTS (RM987-08) only per acre, and the total price of the said Land with an area of 4.481.3 hectares or 11,073 acres is Ringgit: TEN MILLION NINE HUNDRED TWENTY NINE THOUSAND NINE HUNDRED AND EIGHTY THREE (RM10,929,983-00) only and if the area of the said Land according to the Document of Title is more or less of the area designated therefore the total value of the said Land being provided for herein with the additional/deductible rate according to the final area of the said Land.

[7] On 5 April 1996, Majlis was registered as proprietor of the said land. On 13 April 1999, Majlis transferred the said land to Madah Perkasa Sdn Bhd (Madah Perkasa), the wholly-owned subsidiary of KAOP who would develop the said land. In consideration of the transfer of the said land, Majlis on or about 19 April 1999 was allotted 8,218,033 less 201,650 shares (there was a deduction of 201,650 shares for non-payment of RM201,650 towards the premium and quit rent of the said land, pursuant to cl. 2.01(d)) at the nominal value of RM1.33 per share.

[8] Majlis contended that:

(a) clause 2.02(a) provided that with allotment of 8,218,033 shares to Majlis, the issued share capital of KAOP would be held in the proportion of 33% (8,218,033 shares) to Majlis and 67% (16,685,099 shares) to Far East;

(b) clause 2.02(b) provided an option (first option) to Majlis to purchase a further 3,984,501 shares at RM1.33 per share from Far East;

(c) clause 2.02(c) provided that the first option was binding on Far East for a period of two years "from the date of the receipt of the approvals by the shareholders of FEH through Extraordinary Meeting, Foreign Investment Committee (FIC) relating to this joint venture and the Majlis Mesyuarat Kerajaan Negeri relating to the approval of transfer of the said land to the developer company (whichever the later)";

(d) clause 2.02(b) provided that with exercise of the first option, Majlis would hold a further 16% (16%) of the issued share capital of KAOP;

(e) clause 2.02(e) provided that a further option (second option) to Majlis to purchase a further 11% (11%) of the issued share capital of KAOP from Far East;

(f) clause 2.02(f) provided the second option shall be binding on Far East for three (3) years starting and effective from the fifth year after the approvals mentioned in cl. 2.02(c) above are obtained.

Dispute

[9] Dispute arose between the parties. According to Far East and KAOP, Far East had extended loans totalling RM22,096,868 to KAOP to finance the development of the said land. In 1998, KAOP capitalised those loans as paid-up capital and allotted 22,096,868 shares to Far East who consequently held 38,781,967 shares (16,685,099 + 22,096,868). But in the result, the allotment of 8,218,033 shares to Majlis would only amount to 17.5% and not 33% equity of KAOP. Because Far East held 38,781,967 plus 201,650 (there was an increase of 201,650 shares to Far East for payment of the premium and quit rent of the said land – see cl. 2.01(d)] out of a total of 47,000,000 shares, Majlis contended that exercise of the [2] options to purchase shares from Far East would not give Majlis control, let alone 60% control, of KAOP.

The Arbitral Proceeding

[10] Clause 5.01(f) provided that "... disputes that may arise between the three parties herein in relation to this agreement and cannot be resolved by mutual agreement shall be decided by an arbitrator agreed upon and appointed by the parties herein pursuant to the Arbitration Act 1952". On 24 July 2008, the Kuala Lumpur Regional Centre for Arbitration appointed the instant arbitrator as the sole arbitrator to arbitrate the dispute.

[11] In its statement of claim, Majlis pleaded that in 1998, Far East unlawfully increased the paid up capital of KAOP by 22,096,868 shares; that Far East failed to transfer the said 16% to Majlis despite exercise of the first option; that Far East failed to fix a price for the said 11% despite exercise of the second option; that Far East unilaterally fixed the price of the said 11% at the exorbitant price of RM5.50 per share; that Far East diluted the interest of Majlis in KAOP; and that Far East breached the agreement which provided that Majlis would ultimately own 60% of the equity of KAOP.

[12] Majlis prayed for (i) an order to cancel the allotment of 22,096,868 shares to Far East; (ii) an order that Far East transfer the said 16% shares to Majlis; (iii) an order that the arbitrator to determine the value of the said 11% in accordance with cl. 2.02(e); (iv) an order that Far East transfer the said 11% to Majlis, that is, upon payment of the consideration as determined by the arbitrator; and, (v) "damages and losses payable to (Majlis) by (Far East)

in respect of the dividends and all other payments for the dilution of (Majlis) interest in (KAOP) to 17% and for the failure on the part of (Far East) to transfer 16% and 11% of the shares, respectively, in (KAOP) to (Majlis)".

[13] In its statement of defence, Far East and KAOP pleaded that the holding of Majlis "would only be increased from 33% to 60% subject to the terms of the said agreement"; that Majlis failed to exercise the options within time, that is, by or before 4 October 2000 and 4 October 2006; that cl. 3.02 did not specifically state that Far East and KAOP were responsible for the finance to develop the said land; that cl. 3.02 merely stated the manner in which Far East and KAOP would fund the development of the said land; that there was no prohibition in the agreement to an increase of the issued share capital of KAOP; that the agreement did not stipulate that Majlis would be entitled to any allotment of the increased issued share capital of KAOP; that Majlis and Far East, as shareholders, were jointly responsible to pay the loan and accrued interest; that Majlis was aware and consented on 10 April 1997 and 13 May 1997 to the increase in the equity; that Majlis merely expressed an intention to exercise the first option without any indication on the payment of the consideration; that failure to pay the consideration nullified the intention to exercise the first option; that transfer of the said 16% could not occur without payment and because the first option had expired; that the purported exercise of the second option was made without any indication to pay the consideration based on the value of the current assets of KAOP; that failure to pay the consideration nullified the intention to exercise the second option; that on 28 August 2006, Far East offered sale of the said 11% at the price of RM5.50 per share; that the agreement did not provide that the price of the said 11% should be jointly fixed; that Majlis never protested against the valuation of RM5.50 per share; that Majlis requested for time to consider the price of RM5.50 per share and for an extension of time to 31 December 2006 to exercise the second option; and that notwithstanding the request for extension of time, Majlis commenced legal proceedings.

[14] In reply, Majlis pleaded that time to exercise the first option could not run without an offer from Far East to Majlis to exercise the first option; that Far East could only make the offer after registration of the said land in the name of Madah Perkasa; that Far East was aware of the intention of Majlis to exercise the first option; that time was not a fundamental term of the agreement but was at large; that Far East failed and or refused to give notice for the exercise of the first option; that Majlis did not breach any of the fundamental terms as alleged; that by letters dated 1 September 2004 and 8 September 2004, Majlis notified Far East of its intention to exercise the second option; that by letters dated 26 October 2004 and 25 November 2004, both parties agreed that the said 11% would be valued by a valuer appointed with the consent of the parties; that any decision that concerned Majlis and the agreement could only be made in accordance with the Enactment and not by any individual; that Majlis never agreed to the increase in the issued share capital of KAOP; that Far East did not justify the alleged

advance of RM22,096,868 to entitle Far East to the allotment of 22,096,868 shares; that the allotment of 22,096,868 shares was not in accordance with the memorandum and articles of KAOP; that the allotment contravened the provisions of the Companies Act 1965; that Dato Haji Abdul Mutalib was not authorised to decide on matters that pertained to Majlis and to the agreement without the prior approval of Majlis given in accordance with the Enactment; that Majlis never agreed to reduce its holding by 201,650 shares on account of non-payment of RM201,650 towards premium and quit rent of the said land; that Majlis was ready and able to pay all dues related to the said land and the consideration payable on exercise of the first option; that Far East unilaterally appointed Aftaas Corporate Advisory Services Sdn Bhd (AFTAAS) to value the said 11% shares; and that Far East disregarded the rights of Majlis.

[15] Parties could not reach agreement on the issues and facts. All the same, Far East and KAOP submitted the following issues to the arbitrator for determination:

(a) Whether the agreement prohibited Far East from increasing the paid up capital of KAOP;

(b) Whether Majlis had exercised the first option to purchase 3,984,501 shares at the price of RM1.33 per share amounting to RM5,299,386.33 within the time stipulated in cl. 2.02(b) and (c);

(c) Whether Majlis had exercised the second option to purchase 2,739,344 shares within the time stipulated in cl. 2.02(e) and (f);

(d) Whether the time for the exercise of the options was a fundamental term of the agreement;

(e) Whether Majlis failed to exercise the first and second options within the time stipulated in cl. 2.02(c) and (f) and therefore breached the fundamental terms of the agreement.

[16] The arbitrator delivered a most detailed award that covered all issues raised.

[17] On whether the agreement was a shareholders' agreement or a joint venture agreement, the arbitrator held that what was material was the terms of the agreement (para 8.3 of the award).

[18] On whether Majlis pleaded (i) absence of knowledge of the dates of the relevant approvals, (ii) disagreement with the reduction of 201,650 shares by reason of non–payment of quit rent of the said land, (iii) particulars of the special damages claimed, payment of interest on damages awarded, and loss of dividends, the arbitrator held that (at the material time) Majlis did not know when Far East obtained the required approvals from the KLSE and FIC (see paras 10(a) and 21.4 of the award); that whether Majlis agreed to reduce its shareholding by 201,650 shares by reason of non–payment of quit

rent was pleaded in the reply (see para 10(b) of the award); that Far East had sufficient notice of the damages claimed (see paras 10(c) and 30.4 of the award); and that pre-award interest, although not pleaded, could be awarded (see paras 10(d) and 31.1 of the award).

[19] On whether KAOP could increase its paid up capital, the arbitrator held (i) that Majlis had not given any mandate to Dato' Abdul Muttalib and or Dato Wan Ahmad Tajuddin to consent to the allotment of 22,096,868 shares to Far East (see para 12.5 of the award); (ii) that on 16 April 1997 and 13 May 1997, KAOP was still wholly-owned by Far East, and Majlis was yet not a shareholder of KAOP (see para 13.5 of the award); (iii) that only Dato Hamdan bin Jaafar, the proxy for Far East, had voting rights at those board meetings (see para 13.6 of the award); and (iv) that Dato' Abdul Muttalib and Dato Wan Ahmad Tajuddin, who had no voting rights, were present on 16 April 1997 and 13 May 1997 as mere observers (see para 13.6 of the award).

[20] On whether the objection of Majlis to the allotment of 22,096,868 shares to Far East was an afterthought, the arbitrator held (i) that Far East and KAOP should have pleaded limitation and (ii) that Majlis only later knew about the allotment (see para 14.3 of the award).

[21] On the allegation that Dato' Abdul Muttalib and Dato Wan Ahmad Tajuddin were KAOP directors, the arbitrator held that Dato' Abdul Muttalib and Dato Wan Ahmad Tajuddin were appointed by Far East, not by Majlis, to represent Majlis (see para 15.3 of the award) and that the presence of Dato' Abdul Muttalib and Dato Wan Ahmad Tajuddin at board meetings did not constitute consent by Majlis to the said allotment (see 15.8 of the award).

[22] On the reduction of 201,650 shares to Majlis, because of the non-payment of RM201,650 towards quit rent, the arbitrator held that Majlis requested such reduction (see para 15.9 of the award).

[23] On the allotment of additional shares to Far East to settle the loans, the arbitrator held that there was no provision in the agreement for the capitalisation of loans (see para 15.10 of the award).

[24] On the funding for the development of the said land, the arbitrator held (i) that cl. 3.02 provided the manner to raise those required funds (see para 15.11 of the award); (ii) that it was not provided that the development of the said land would be financed by allotment of shares (see para 15.13 of the award); and (iii) that the said allotment in 1998 effectively prevented Majlis from acquiring majority control of KAOP, which was contrary to the spirit and intent of the agreement (see para 15.14 of the award).

[25] On the defence in general, the arbitrator remarked at paras 16 to 19 of the award (i) that in contradistinction to the formal exchange of correspondence between Majlis and Far East with respect to the allotment

of 151,616 shares, there was no official meeting or letter from Majlis to confirm the allotment of 22,096,868 shares; (ii) that after 13 May 1995, when Far East found out that the terms of the agreement were not to its liking, it expressed intention to fundamentally change the terms of the agreement; (iii) that Far East, who alleged that Dato Abdul Muttalib and Dato Wan Ahmad Tajuddin consented to the allotment, must call Dato Abdul Muttalib and Dato Wan Ahmad Tajuddin to testify; (iv) that an adverse inference should be invoked against Far East for failure to call Dato Abdul Muttalib and or Dato Wan Ahmad Tajuddin to testify; (v) that no benefit could be derived by Majlis to agree to the capitalisation of the loans and interest; (vi) that the true reason for the allotment in 1998 was to deny Majlis a 60% interest in KAOP; (vii) that the income generated by KAOP, which could give generous dividends, would settle the bank loans and interest in due course; (viii) that the reasons proffered for the said allotment could not be accepted; and (ix) that the board meeting on 13 May 1997, when Far East was the only shareholder of KAOP, set the scene to deprive Majlis of ever acquiring a majority control of KAOP.

[26] At para 20 of the award, the arbitrator held that Majlis "had successfully established" (i) that the agreement expressly stated that Majlis was entitled to exercise second options to ultimately own 60% shares; (ii) that after execution of the agreement, any change in the equity of KAOP required the consent of Majlis which could only be given by a committee or person authorised by Majlis pursuant to the Enactment; (iii) that 22,096,8686 shares were allotted without the consent of Majlis; (iv) that the said allotment was a fundamental breach of the agreement; (v) that the allotment of 22,096,8686 shares to Far East at RM1 per share was inconsistent with the agreement which provided that the allotment to Majlis was at RM1.33 per share and inconsistent with the allotment of 151,616 shares at RM1.33 per share to capitalise the RM201,650 paid towards the premium and quit rent.

[27] At para 20.3 of the award, the arbitrator concluded (i) that the allotment of 22,096,868 shares should be cancelled; (ii) that Far East should pay damages to Majlis; and (iii) that Majlis, with the cancellation of the allotment of 22,096,868 shares, would be indebted to Far East in the sum of RM22,096,868. The arbitrator noted that Far East had enjoyed dividends from those 22,096,868 shares from 2002 to date of the award. Thereafter, the arbitrator held that there should be a "re-allocation" of the dividends between Far East and Majlis and that there should be payment of interest at the rate of 4% per annum "on the shortfall of the dividends payable to Majlis" by Far East to Majlis. But in favour of Far East, the arbitrator held that there was justification for the allotment of 151,616 shares to Far East, that is, to capitalise the payment of RM201,650 towards the premium and quit rent of the said land.

[28] As said, the arbitrator delivered a most detailed award, to the point that even after he made his aforesaid conclusions, he persisted to deliberate on the issues and evidence to further justify his conclusions.

[29] On the first option, the arbitrator held (i) that the two-year timeline under cl. 2.02(c) was subject to cl. 2.02(b); (ii) that Far East was aware that Majlis intended to exercise the first option; (iii) that notice of that intention was given by letter dated 2 November 1995; (iv) that on 12 December 1995, Far East replied that the conditions in cl. 2.02 were yet to be fulfilled; (v) that by letter dated 21 August 1996, Majlis again informed Far East of its intention to exercise the first option, to which Far East did not reply; (vi) that time was not of the essence, as cl. 2.02(c) was dependant on an offer by Far East to Majlis; (vii) that Far East must give notice under s. 47 of the Contracts Act 1950 to make time of the essence; and (viii) that in the absence of a notice fixing time for exercise of the first option, Far East could not contend that time to exercise the first option had lapsed (see paras 22.1-24.4 of the award).

[30] On the time to exercise the options, the arbitrator held that once time for completion was allowed to pass and parties entered into negotiations, there was a waiver on time being of the essence (see para 24.5 of the award).

[31] On the negotiations between the parties and the exercise of the first option, the arbitrator held (i) that Majlis, by letters dated 2 November 1995 and 21 August 1996, had clearly put Far East on notice of its intention to exercise the first option; (ii) that Majlis expected Far East to inform Majlis of the date for completion; (iii) that cl. 2.02(b) provided that Far East must make an offer to Majlis; (iv) that the conduct of the parties plus cl. 2.02(b) had lulled Majlis into a sense of security that notice would be given to Majlis to exercise the first option; and (v) that the letter of Majlis dated 14 October 2002 fulfilled cl. 2.02(b) of the agreement (see para 24.6-24.10 of the award).

[32] On the contention that Majlis had no funds to exercise the options, the arbitrator held that the accounts of Majlis showed that Majlis had sufficient funds to exercise the options (see para 25.3 of the award).

[33] On Far East's revocation of the offer to exercise the first option, the arbitrator held (i) that the first option, in the absence of an offer by Far East to Majlis to trigger time to run, was still valid and in subsistence; (ii) that Majlis, by letter dated 14 October 2002, had lawfully exercised the first option; (iii) that Far East, by letter dated 24 December 2002, unlawfully revoked the option; and (iv) that time for exercise of the options was not of the essence, which, even if of the essence, was waived by conduct (see para 26.1 of the award).

[34] On the second option, the arbitrator held (i) that cls. 2.02(e) and (f) were the applicable provisions; (ii) that Far East, by letter dated 22 October 2003, informed Majlis that the second option could be exercised at any time between 5 October 2003 to 5 October 2006; (iii) that the second option could

only be exercised after a valuation of the shares as determined by negotiation and based on the current asset value of KAOP and Madah Perkasa at the time of exercise of the second option; (iv) that Majlis, by letter dated 1 September 2004, informed Far East that it would exercise the second option; (v) that it was agreed at a meeting between Majlis and Far East on 8 September 2004 that the value of the shares would be the value as at the date of exercise of the second option and as determined by a valuer appointed with the consent of the parties and by negotiation; and (vi) that witness RW1 confirmed that there was such a meeting on 8 September 2004 and such an agreement (see paras 27.7(a) and 27.8 of the award).

[35] As to whether Majlis could exercise the second option, the arbitrator held that the second option was valid and that Majlis was entitled to exercise the second option at a price to be determined, for the following reasons: (i) Majlis had exercised the second option on 1 September 2004; (ii) Far East had not sought the consent of Majlis to appoint AFTAAS as the valuer; (iii) there was no explanation from Far East for the delay in the appointment of a valuer, even though agreement was reached on 8 September 2004 on the appointment of a valuer with the consent of the parties; (iv) in not appointing a valuer with the consent of the parties, Far East delayed and prevented exercise of the second option; and (v) time was not of the essence (see paras 27.14 and 27.15 of the award).

[36] On the AFTAAS report on the value of the shares, the arbitrator held (i) that AFTAAS was appointed without the consent of Majlis; (ii) that the AFTAAS report was commissioned for Far East; (iii) that Far East only appointed AFTAAS when it was hardly a month before expiry of the second option; (iv) that Majlis received the AFTAAS report on 4 September 2006; (v) that Majlis could not have agreed to AFTAAS as the valuer, as a director of AFTAAS was also a director of Far East; and (vi) that the AFTAAS report should be viewed with caution (see paras. 28.1-28.14 of the award).

[37] On the fair value of the shares, the arbitrator held (i) that the nett tangible asset was the better approach to value the shares; and (ii) that the fair value of each share was RM5.3244 (see paras. 29.5-29.10 of the award).

[38] On damages for breach of the agreement, the arbitrator held (i) that the loss of dividends was a direct result of breach to transfer the said 16% and 11% to Majlis; (ii) that Majlis' loss of dividends for the period up to 2010 amounted to RM97,692,957; (iii) that the cost of exercise of the first option was RM5,299,386; (iv) that the cost of exercise of the second option was RM14,585,363.20; (v) that the total cost of exercise of both options was RM19,884,749.20; and (vi) that the quantum of damages payable by Far East to Majlis was RM77,808,207.80 (RM97,692,957 less RM19,884,749.20) (see paras. 30.1-30.13 of the award).

[39] On interest, the arbitrator held (i) that payment of interest was based on common law and s. 11 of the Civil Law Act 1956; (ii) that it was held in *Karpal Singh Ram Singh v. DP Vijandran* [2003] 2 CLJ 77; [2003] 2 MLJ

385 that an award of interest is a matter of court discretion; (iii) that an award of pre-award interest at 4% per annum was reasonable; (iv) that jurisdiction to award post-award interest was provided in s. 33(6) of AA 2005; and (v) that the award should carry post-award interest at the rate of 4% per annum from date of the award to date of satisfaction (see paras 31.1-31.14 of the award).

[40] The arbitrator ordered Far East to return the certificates for 22,096,868 shares for cancellation and the company secretary to restore the issued share capital of KAOP to the proportion of 67.61% (16,836,715 shares) to Far East and 32.39% (8,066,417 shares) to Majlis. The arbitrator declared that the allotment of 22,096,868 shares was unlawful and contrary to the terms and spirit of the agreement and that Majlis had exercised the first and second options in accordance with the agreement. The arbitrator ordered Far East to transfer 3,984,501 shares (16%) to Majlis. The arbitrator also ordered Far East (i) to transfer 2,739344 shares (11%) to Majlis at RM5.3244 per share; (ii) to pay damages in the sum of RM77,808,207.80 (RM97,692,957 minus RM19,884,749.20); (iii) to pay damages to Majlis for loss of dividends from 2002 to date of the award and interest thereon at 4% per annum from 1 January 2011 to date of the award, both on the basis that Far East had 10,112,870 shares and Majlis had 14,790,262 shares; and (iv) to pay costs of RM150,000 to Majlis.

At The High Court

[41] In relation to the capitalisation of the loans, Far East and KAOP referred the following five "questions of law arising out of the award" to the High Court:

(i) Whether the arbitrator was correct in law in striking down the allotment of the additional shares of 22,096,868 from the increase in the paid-up capital in the second plaintiff when such decision was made by the directors and shareholders of (KAOP) without regard to the fact that (Far East) and (KAOP) are separate legal entities?

(ii) Whether the arbitrator was correct in law in failing to conclude that (Majlis) nominee directors on the Board of (KAOP) could validly bind (Majlis) in the stand they took in failing to object to the new allotment of shares?

(iii) Whether the arbitrator was correct in law in holding that the failure of (Far East and KAOP) to plead limitation deprived (Far East and KAOP) of its defence that (Majlis) objection on the allocation of 22,096,868 additional shares to (Far East) is an afterthought?

(iv) Whether the arbitrator was correct in law in holding that the burden lies on (Far East) to call (Majlis) nominees as witnesses and consequently, drawing an adverse inference against (Far East and KAOP) for not calling them?

(v) Whether the arbitrator in deciding if there was a breach of the agreement ought to specifically construe the agreement based on its written terms and within the four corners of the agreement without basing it on extraneous factors?

[42] The High Court noted that the findings of the arbitrator were (i) that the agreement stated that the initial share capital of KAOP was fixed at 24,903,132 shares to be held by Far East (16,685,099 shares) and Majlis (8,218,033 shares); (ii) that Majlis was entitled to exercise two options to ultimately own 60% equity; (iii) that after execution of the agreement, any change of the capital of KAOP required the consent of Majlis which could only be given by Majlis or a committee or person authorised by Majlis pursuant to the Enactment; (iv) that 22,096,868 shares were allotted to Far East without the consent of Majlis; and (iv) that the said allotment was a fundamental breach of the agreement.

[43] On those findings of the arbitrator, the High Court held (i) that the arbitrator did not dispute the fact that KAOP could increase its paid up capital; and (ii) that the approach taken by the arbitrator in finding the intention of the parties, *to wit* that Majlis would ultimately own 60% equity, was supported by *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597, where it was held by the Federal Court that in interpreting a private contract, one must look at the factual matrix.

[44] On the finding of the arbitrator that Dato Abdul Mutalib and Dato Wan Ahmad were appointed by Far East and not Majlis, the High Court agreed that both Dato Abdul Mutalib and Dato Wan Ahmad were appointed by the board of directors of KAOP on 20 January 1993, that is, when KAOP was still wholly-owned by Far East, and therefore not by Majlis.

[45] On the invocation of the adverse inference against Far East and KAOP for failure to call Dato Abdul Mutalib and or Dato Wan Ahmad to testify, the High Court held that since it was the case of Far East and KAOP that Dato Abdul Mutalib and or Dato Wan Ahmad were authorised to act on behalf of Majlis, the adverse inference was "countenanced by law".

[46] The High Court also agreed with the finding that the said allotment in 1998 was without the consent of Majlis, as Dato Abdul Mutalib and Dato Wan Ahmad were not appointed by Majlis, and as consent was not given by Majlis in accordance with the Enactment.

[47] In relation to the exercise of the first option, Far East and KAOP referred the following four "questions of law arising out of the award" to the High Court:

(vi) Whether the arbitrator was correct in law in failing to hold that timeliness for exercise of an option in a purely commercial contract must be construed strictly?

(vii) Whether the arbitrator should not in law have held, as regard to the imposition of time limit for exercise of the option, that an exercise of the option outside the stipulated time period is invalid in law?

(viii) Whether the arbitrator was correct in law in not holding that the exercise of an option to purchase shares in a purely commercial transaction without the tender of the purchase price was invalid or *non est* in law?

(ix) Whether the arbitrator was correct in law in failing to conclude that the burden of acting within the stipulated time to exercise an option fell on the option-holder and not on the option-giver?

[48] The High Court held (i) that cl. 2.02(c) must be read with cl. 2.02(b) which provided that Far East must make an offer to Majlis to exercise the first option; (ii) that the required approvals from the shareholders of Far East, FIC, Land Office, were not matters within the knowledge of Majlis, and that Majlis, unless informed, would not know the dates of the approvals; and (iii) that there was no error by the arbitrator in the construction of sub-cls. 2.02(b) and (c).

[49] On the second option and the exercise thereof, Far East and KAOP referred the following six "questions of law arising out of the award" to the High Court:

(x) Whether the arbitrator was correct in law in failing to conclude that timelines for exercise of an option to purchase shares in a purely commercial contract was strict and the right to exercise the option lapsed once time has run?

(xi) Whether the arbitrator should not have held in law that the second option was void and unenforceable unless price was agreed within the stipulated time?

(xii) Whether the arbitrator erred in law in failing to hold that the burden of complying with all the terms for exercise of the option lay with the option-holder and that if the option-holder failed to take the requisite steps within the stipulated time, the option lapsed?

(xiii) The arbitrator should have held in law that since price was not agreed between the parties within the stipulated time or at all, the option had lapsed?

(xiv) Whether the arbitrator was correct in law in rejecting the share valuation report presented by the first plaintiff when the option clause envisaged a price based on the current asset value of the assets of the second plaintiff?

(xv) Whether the arbitrator had acted validly in law in treating the option period as still open for exercise when there was no agreement on price and when the terms of the option clause had not been fulfilled by the defendant?

[50] To those questions, the High Court answered (i) that the findings of the arbitrator on the exercise of the second option were findings of fact which should not be disturbed; and (ii) that there was no error of construction of the provisions that pertained to the second option.

[51] On the quantum of damages and the award of interest, to which Far East and KAOP had put forward three 'questions of law arising out of the award', the High Court held that the arbitrator did not err on the award of damages which was premised on breach. But on the interest awarded, the High Court held that the arbitrator had no jurisdiction to award pre-award interest, and that post-award interest, since not pleaded, should not have been awarded. Except on the pre and post-award interest, the High Court held that there was no 'question of law arising out of the award' that merited judicial intervention.

[52] The application of Majlis for recognition and enforcement of the award was granted in terms, minus the pre-award and post-award interest.

Decision Of The Court Of Appeal

[53] Far East and KAOP submitted that the award was manifestly unlawful, unconscionable and perverse and ought to be set aside.

[54] Majlis cited *Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766; [2009] MLJU 1697; [2011] 3 AMR 315 and submitted that a court should take a limited view of its jurisdiction under s. 42. Majlis cited *AJWA For Food Industries Co (MIGOP), Egypt v. Pacific Inter-Link Sdn Bhd & Another Appeal* [2013] 2 CLJ 395, where it was said by Ramly Ali JCA (as he then was) delivering the judgment of the court, that "the court should be slow in interfering with an arbitral award ... Once parties have agreed to arbitration they must be prepared to be bound by the decision of the arbitrator …", and submitted that a court should be slow in interfering with an arbitral award. Majlis also cited *Exceljade Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2013] 1 LNS 1470; [2014] 1 AMR 253, where Nallini Pathmanathan J, as she then was, cited *Georgas SA v. Trammo Gas Ltd (The 'Baleares')* [1993] 1 Lloyd's Rep 215, where Steyn J said that parties who submit disputes to arbitration bind themselves to honour the arbitrator's award on the facts and that the principle of party autonomy decrees that a court ought not to question the arbitrators' findings of fact.

[55] The Court of Appeal, per Aziah Ali JCA, as she then was, delivering the judgment of the court, agreed that *Baleares* as well as *Soh Beng Tee & Co Pte Ltd v. Fairmont Development Pte Ltd* [2007] 3 SLR 86 reflected the policy of minimal intervention by the court:

> [38] Thus on the authorities, it is clear that in applications made under s. 42 of the Act, errors by an arbitrator such as drawing wrong inferences of fact from the evidence before him, be it oral or documentary, is in itself not sufficient for the setting aside of an award (*Intelek Timur Sdn Bhd v.*

A *Future Heritage Sdn Bhd* [2004] 1 MLJ 401; [2004] 1 CLJ 743). Likewise, the suggestion that the arbitrator has misapprehended and misunderstood the evidence presented is also not a sufficient ground to set aside an arbitral award (*Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210; [1969] 1 LNS 172). The court also does not and should not sit in appeal and examine the correctness of the award
B on merits (*Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481; [1999] 2 CLJ 788 (CA). The instances we state here are not in the least intended to be exhaustive.

[56] Aziah Ali JCA though added "that it is a fundamental principle of law that an arbitral award that is tainted with illegality can be challenged and may
C be set aside by the courts on the ground that an error of law has been committed, and that the question of construction of a document is a question of law":

> In the case of *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2011] 6 MLJ 441; [2012] 3 CLJ 423, the Federal Court said, amongst
> D others, that all matters regarding the construction of a document is a question of law and is thus a specific reference. Therefore it is necessary for the appellant to show illegality. The Federal Court said as follows (para 33):
>
> > In our view the Supreme Court in *Ganda Edible* and the Federal
> > E Court in *Intelek Timur* did not introduce any new ground for challenge. Both cases merely reiterated a fundamental principle of law, *to wit*, that if a decision of an arbitrator is tainted with illegality, it is always open for challenge. Thus, even where a specific reference has been made to the arbitrator, if the award subsequently made is tainted with illegality, it can be set aside by
> > F the courts on the ground that an error of law had been committed. It must be stressed here that the award must be tainted with some sort of illegality. It must also be emphasised that the word 'may' is used here, in that the award may be set aside. Discretion still lies with the court as to whether to respect the award of the arbitral tribunal or to reverse it.
>
> G Further in para 34, the court said:
>
> > … the Supreme Court in *Ganda Edibile* did state that construction is, generally speaking, a question of law. In our view all matters regarding the construction of a document is a question of law. It may very well be that in some cases, other matters are brought up
> > H for consideration which may involve questions of fact, but where the matter solely referred to is the construction of a document, it must be said to be solely a question of law …
>
> And in para 44 of the judgment, the court also said:
>
> > I In this case it is not in dispute that the matter referred for arbitration is one of construction of the terms in the PSC, a question of law and thus a specific reference. Therefore it is necessary for the appellant to show illegality.

[57] In the opinion of the Court of Appeal, "the matter that was referred for arbitration relates to the construction of the agreement and is thus a question of law and a specific reference, although in the course of interpreting the terms of the agreement, the arbitrator was required to make findings of fact" and "a final award must be seen in its entirety and the entire facts of the case leading to the award must be taken into account to decide if there is error of law on the face of the award (*Sanlaiman Sdn Bhd v. Kerajaan Malaysia* [2012] 1 LNS 796; [2013] 3 MLJ 755; [2013] 2 AMR 523)".

[58] As to whether there was an error of law in the construction of the agreement by the arbitrator, the Court of Appeal held that "the approach adopted by the arbitrator in construing the agreement is proper as it is consonant with case law … is appropriate since the dispute between the parties arose out of a commercial contract".

[59] On the substantive issues before the arbitrator and his findings, the Court of Appeal first critically examined the issues and evidence and held that the findings of the arbitrator on the allotment of 22,096,868 shares to Far East, on the presence of the two supposed directors of Majlis at KAOP board meetings, on the absence of the consent of Majlis, on the source and manner of funding, on the absence of provision for the allotment of additional shares, on the invocation of the adverse inference, on the impossibility of Majlis ever controlling KAOP, on breach of the agreement, on the options, on the value of the shares, on loss of dividends and damages, indeed on each finding of the arbitrator, were "based on findings of fact from the evidence, oral and documentary, that were produced before him".

[60] But on the interest awarded, the Court of Appeal agreed with the High Court that there is no provision in AA 2005 for pre-award interest, and that post-award interest, which was not pleaded, should not have been awarded.

[61] All three appeals were dismissed by the Court of Appeal.

Submissions Before This Court In 02-19-04-2016 And 02-20-04-2016 (Appeals By Far East And KAOP)

[62] Long submissions (106 pages by Far East and KAOP, 217 pages by Majlis) were filed by the parties and by the Malaysian Bar Council who appeared as "*amicus curiae*". Much of what were submitted by the parties were but a different twist to the same arguments before the arbitrator with respect to the issues, findings of fact and evidence which we have already alluded to and or narrated in our summary of the arbitral proceedings. As such, we would only summarise the legal submissions and mention the authorities cited by learned counsel, interspersed, where necessary, with some of the facts and factual arguments.

Far East And KAOP's Submissions

[63] In relation to leave questions 1 and 2, Far East and KAOP submitted as follows. Section 42 is unique to Malaysia; the right to challenge an award is not subject to leave being granted. Under s. 42, a challenge may be brought without the leave of court on any question of law arising out of an award which substantially affects the rights of one or more of the parties. Notwithstanding the wording of s. 42, the Court of Appeal in numerous cases, including the instant, adopted the restriction in case law decided under the former Arbitration Act 1952 (AA 1952), where a distinction was made between a specific reference of an issue to arbitration and a general reference. Under AA 1952, there could not be a review at all if the arbitrator's error of law was made under a specific reference (*King v. Duveen & Ors* [1913] 2 KB 32 relying on *Timpson v. Emmerson* [1847] 9 LT (O.S.) 199, *Absalom Limited v. Great Western (London) Garden Village Society, Limited* [1933] AC 592, *Chain Cycle Sdn Bhd v. Kerajaan Malaysia* [2016] 1 CLJ 218, *Sharikat Pemborong Pertanian Perumahaan v. Federal Land Development Authority* [1969] 1 LNS 172; [1971] 2 MLJ 210, *The Government of India v. Cairns Energy India Pty Ltd & Anor* [2012] 3 CLJ 423).

[64] The distinction between a specific and a general reference was still applied (*Sanlaiman Sdn Bhd v. Kerajaan Malaysia* [2012] 1 LNS 796; [2013] 2 AMR 523, *Chain Cycle, Petronas Penapisan (Melaka) Sdn Bhd v. Ahmani Sdn Bhd* [2016] 3 CLJ 403; [2016] 2 MLJ 697). Where not stated, the Court of Appeal should not read restrictions into s. 42. Unlike the UK provision, the Second Schedule cl. 5 of the New Zealand Arbitration 1996 or s. 49 of the Singapore Arbitration Act 2002, AA 2005 does not require leave to be obtained to challenge an award. Section 8 of AA 2005 maintains a balance between the finality of awards and the right of review. It is not warranted to impose "a further restriction derived from case law of the *Absalom* exception on the basis of the flood-gates argument and the like", as was done in *Chain Cycle*. The restriction militates against the express wording of s. 42. The word 'any' is of the widest amplitude. There is no justification to read "any question of law" as applicable to some questions of law but not to others (*Schiffahrtsagentur Hanburg Middle East Line GmbH v. Virtue Shipping Corpn; The Qinoussian Virtue* [1981] 2 All ER 887 at 893-894). "Any question of law" is wide enough to cover all questions of law arising out of an award, whether made pursuant to a general reference of a dispute or a specific reference of an issue. "Arising out of an award" means that the question of law must arise from the award and not from the proceedings (*Majlis Amanah Rakyat v. Kausar Corporation Sdn Bhd* [2009] 1 LNS 1766; [2009] MLJU 1697, *Exceljade, Kerajaan Malaysia v. Perwira Bintang Holdings Sdn Bhd* [2015] 1 CLJ 617 at [57c]). It should not matter whether the award is the product of arbitration pursuant to a general reference or a specific reference.

[65] The construction of a contract is a question of law (*Bahamas International Trust Co Ltd v. Threadgold* [1974] 1 WLR 1514 at 1525, *Pioneer Shipping Ltd & Ors v. B.T.P. Tioxide Ltd (The Nema)* [1982] AC 724 at 736B, *Lesotho Highlands Development Authority v. Impregilo SpA* [2006] AC 221 at [31], *Cairns Energy* at [36]). In the context of questions of law arising out of arbitration awards, Lord Steyn said in *Lesotho* that "a mistake in interpreting the contract is the paradigm of a question of law which may in the circumstances of s. 69 be appealed ...". Given the similarities between the UK provision and s. 42, no other limitation should be read into s. 42 apart from the restriction in the provision itself.

[66] The proper test is "substantially affects the rights of one or more of the parties". The test of illegality stated in *Cairns Energy*, of patent injustice stated in *AJWA Food Industries* and of manifestly unlawful and or unconscionable or perverse in *Kerajaan Malaysia v. Perwira Bintang*, do not conform to s. 42 which should be read as it stands. The language of a statute should not be substituted with other words (*Brutus v. Cozens* [1972] 2 All ER 1297 at 1299), *Murray and Another v. Foyle Meats Ltd* [1999] 3 All ER 769 at 733). The phrase "substantially affects the rights" was the only restriction taken from s. 69(3)(c) of the UK Act. The raft of restrictions in s. 69(3)(c) of the UK Act has not been adopted in AA 2005. Section 42 takes a more liberal approach in comparison to the UK s. 69. For purposes of s. 42, only the phrase "substantially affects the right of the parties" falls to be construed and applied as a test. A party's legal rights could be substantially affected even without 'patent injustice', 'substantial injustice' or 'manifestly unlawful' and the like (*SDA Architects v. Metro Millenium Sdn Bhd* [2014] 3 CLJ 632; [2014] 2 MLJ 627 at 35). The approach taken by the High Court in *Lembaga Kemajuan Ikan Malaysia v. WJ Construction Sdn Bhd* [2013] 8 CLJ 655 and *Tune Insurance Malaysia Bhd & Anor v. Messrs K Sila Dass & Partners* [2015] 9 CLJ 93, without resort to the label of 'patent injustice', 'substantial injustice' or 'manifestly unlawful', is the correct approach.

[67] A mistake in the construction of a contract or misapplication of its terms would substantially affect rights. Pursuant to s. 30(5) of AA 2005, an arbitral tribunal is obliged to decide in accordance with the terms of the contract. In a review, the court is to determine if the arbitrator decided the question rightly and not to defer to his interpretation.

[68] The Court of Appeal took the wrong approach when it followed *Cairns Energy* at 448, which was decided under AA 1952. In the *Lembaga Kemajuan Ikan* case, Mary Lim J, as she then was, observed that s. 42(1) approximates to an error of law on the face of the award. If the arbitrator proceeded illegally as understood in the old cases, then he has committed an error of law that is reviewable under s. 42. "The phrase originates from *Government of Kelantan v. Duff Development* [1923] AC 395 and has been adopted in *Halsbury's Laws* 4th edn. vol. 2 para 623. An arbitrator would have proceeded illegally if he applied 'principles of construction that the law does not

countenance' or deciding on evidence which was not admissible: see application of the principle in *Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743; *Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186." A clear case would be where the arbitrator failed to consider the relevant law or omitted consideration of relevant causes in the contract in arriving at his decision (*Maimunah Deraman v. Majlis Perbandaran Kemaman* [2011] 9 CLJ 689 at [27-28]). A further area of review under the "question of law" principles decided wrongly is the illogical or perverse award that no arbitrator acting reasonably could have made (learned counsel cited *Perwira Bintang* at [35] and *Sikkim Subba Association v. State of Sikkim* AIR 2001 SC 2062). In all such cases, rights were substantially affected. In the seminal case of *The Nema* under s. 1(4) of the UK Arbitration Act 1979 which bore similarity to s. 42, Lord Diplock included the category of where a question of law would arise under *Edward v. Bairstow* [1956] AC 14. 'Questions of law' should not be restricted to 'patent injustice' or 'manifestly unjust' and the like. It should apply to every legal issue decided by the arbitrator that substantially affected the parties.

[69] On the capital increase, options, and damages issues, apart from the arguments that pertained to the construction of the agreement, the evidence and the factual findings of the arbitrator, Far East and KAOP submitted as follows. The legality of the capital increase must be determined solely by reference to the Companies Act and the articles of association (*Tung Ah Leek & Anor v. Perunding DJA Sdn Bhd & Ors* [2004] 1 LNS 591; [2005] 3 MLJ 667 at [13]). The agreement was a joint venture agreement. In striking down the allotment, the arbitrator failed to appreciate that Far East and KAOP were separate legal entities and separate in law from their shareholders. Shareholders could not preclude a company or its shareholders from exercising rights under the articles or under the Company Act (*Exeter City AFC v. Football Conference Ltd* [2004] 4 All ER 1179, *Union Music Ltd v. Watson* [2003] 1 BCLC 453, *Russell v. Northern Development Bank* [1992] BCLC 1016 HL). Rights of shareholders, *inter se*, are only enforceable between them. In *Jet-Tech Materials Sdn Bhd & Anor v. Yushiro Chemical Industry Co. Ltd & Ors and Another Appeal* [2013] 2 CLJ 277 at [37], the Federal Court made a distinction between matters that concerned the company and breaches of a shareholders' agreement. The arbitrator made a fundamental mistake when he struck down the allotment without any determination as to whether the proper remedy was damages. A company is not governed by a shareholders' agreement. Unless an understanding in a shareholders' agreement is incorporated in the articles, it does not bind the company (*Tung Ah Leek* and *Beh Chun Chuan v. Paloh Medical Centre Sdn Bhd & Ors* [1999] 7 CLJ 1; [1999] 3 MLJ 262).

[70] In relation to the consent of Majlis and the authority of Dato' Abdul Mutalib or Dato' Wan Ahmad Tajuddin, the arbitrator failed to appreciate that the Enactment governed only Majlis and not Far East or KAOP. The

mistake was not to understand where the responsibilities of a director lie in company law. Upon appointment, a director's fiduciary duties and loyalties are owed to the company (*Scottish Co-operative Wholesale Society Ltd. v. Meyer* [1959] AC 324 at 341, 363 and *Boulting v. A.C.T.A.* [1963] 2 QB 606). The arbitrator failed to apply the rule of ostensible authority. The appellants were entitled to assume that everything was regular when the representatives of Majlis consented to the capital increase. There could be no safety if internal irregularities could be allowed to defeat transactions validly entered into (*Pekan Nenas Industries Sdn Bhd v. Chang Ching Chuen & Ors* [1998] 1 CLJ 793; [1998] 1 MLJ 465). The rule was firmly established in *Penang Development Corporation v. Teoh Eng Huat & Anor* [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204; [1992] 1 MLJ 749 and *First Energy (UK) Ltd. v. Hungarian International Bank Ltd.* [1993] BCLC 1409 that if the relevant officer who participated in the transaction is a high official, it is ostensible authority that matters and not actual authority. In *Hubah Sdn Bhd & Ors v. Koperasi Pusaka (Penampang) Bhd* [2013] 6 CLJ 837, it was held that the rule in *Turquand*'s case applies to bodies other than corporations. In all these cases, internal irregularity did not vitiate the transaction because of the doctrine of ostensible authority. The arbitrator failed to appreciate the rule in *Turquand* which was recently applied in *Bumiputra Commerce Bank Bhd v. Augusto Pompeo Romei & Anor* [2014] 6 CLJ 17; [2014] 3 MLJ 672. Far East and KAOP were not concerned with the internal management of Majlis. Far East and KAOP were entitled to assume that all matters of indoor management required to be done were done. The alleged absence of mandate did not affect the decisions consensually made. If Dato Abdul Mutalib chose not to object to the capitalisation of the loans, it was logical for the board to proceed on the basis that there was consensus. Majlis was bound by the consent of Dato Abdul Mutalib and Dato Wan Ahmad Tajuddin.

[71] It was unreasonable to impose the burden on Far East and KAOP to call Dato Abdul Mutalib and Dato Wan Ahmad Tajuddin. Majlis, who pleaded that the presence of the two Datos at the meeting did not constitute consent, had to prove that defence. Dato Abdul Mutalib and Dato Wan Ahmad Tajuddin were Majlis representatives even before Majlis was a shareholder of KAOP. Majlis should explain why they were not called. It was wrong to invoke the adverse inference against Far East and KAOP.

[72] On the option clauses, the arbitrator failed to consider that time ran from the last of the approvals (*Sanlaiman*). On 19 April 1999, Majlis was allotted its shares. By then, Majlis should know that approval for transfer had been granted. The consent for transfer, given on 5 October 1998, must have been in Majlis' knowledge, as the consent letter was addressed to the solicitors for Majlis. Time started to run on 19 April 1999. The contention that there should be an offer to exercise the first option was erroneous. Clause 2.02(b) and (c) contained the offer itself. "If it were otherwise, it would lead to the absurdity that the making of the offer was left to the discretion of Far East who could delay the increase in stakeholding by Majlis". The first

option was conferred by the agreement itself. The price and option period were specified. There was nothing more to be done by Far East, other than for Majlis to exercise the option and tender the price.

[73] The terms of an option must be strictly construed, both as to time and manner for its exercise (*United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904, *Tan Chee Hoe & Anor v. Ramjethmal Punjabi* [1983] 2 CLJ 150; [1983] CLJ (Rep) 1022; [1983] 2 MLJ 31, *Chin Kim & Anor v. Loh Boon Siew* [1969] 1 LNS 27; [1970] 1 MLJ 197, *McLachlan Troup v. Peters & Anor* [1983] 1 VR 53, *Bressan v. Squires* [1974] 2 NSWLR 460, *Lewes Nominees Pty Ltd v. Strang* [1983] 49 ALR 328). The arbitrator failed to strictly apply the timelines in the option clauses. The arbitrator's reliance on *Berjaya Times Square* was erroneous.

[74] The arbitrator held that the letter dated 14 October 2002 was an offer by Far East to Majlis to exercise the first option and was a waiver of its right to insist on time being of the essence. But that letter was a nullity, for it was issued two years after the dateline for exercise of the first option had expired. If that letter were an offer, then it was a new offer upon the terms set out therein. A new offer is an offer to create a new contract (*Mintye Properties Sdn Bhd v. Yayasan Melaka* [2006] 4 CLJ 267). The arbitrator failed to appreciate the terms of the letter dated 14 October 2002. That letter dated 14 October 2002, which was not an offer under the option clause, was revoked.

[75] The arbitrator failed to consider that cl. 2.02(h) required payment for transfer of shares. There must be consideration (*Macon Works & Trading Sdn Bhd v. Phang Hon Chin & Anor* [1975] 1 LNS 93; [1976] 2 MLJ 177). It is for the option-holder to exercise the option (*Laybutt v. Amoco Australia Pty Ltd* [1974] 132 CLR 57 at 76). To complete a purchase, an option-holder gives notice of intention so to do and tenders the whole purchase price (learned counsel cited *Chin Kim* at 198 which cited *Fry on Specific Performance* 6th edn, at 515). In his construction of the first option, the arbitrator applied the wrong principles of law that substantially affected the rights of Far East who was not obligated to transfer the option shares to Majlis.

[76] At para 27.4 of the award, the arbitrator acknowledged that Far East had, by letter dated 22 October 2003, informed Majlis that the second option could be exercised at any time from 5 October 2003 to 5 October 2006. Time for exercise of the second option ran from 22 October 2003. At para 27.5 of the award, the arbitrator acknowledged that the value of the second option shares had to be determined through negotiations. Even after expiry of the second option, the parties could not agree on the value of the second option shares. However, the arbitrator dismissed the contention that the second option was not exercised within time. Instead, the arbitrator ruled that the right of Majlis to exercise the second option was valid and in subsistence. The arbitrator accepted the valuation of Adam & Co and proceeded to determine the value of the second option shares. But the arbitrator failed to appreciate that the value of the second option shares, pursuant to cl. 2.02(e),

had to be determined through negotiations. The arbitrator failed to appreciate that when parties failed to agree on the value of the second option shares within the time specified, the second option was void and unenforceable (*Sik Hong Photo Sdn Bhd v. Ch'ng Beng Choo* [2010] 5 CLJ 427; [2010] 3 MLJ 633). In ruling that Far East delayed exercise of the second option by not appointing a valuer with the consent of Majlis, the arbitrator failed to observe that the burden lay on the option-holder to insist on negotiations to settle the price. The provisions of cl. 2.02(e) were ignored. Majlis had the burden to initiate negotiations. Majlis failed to take the requisite steps within the option period. The price was to be decided by the parties through negotiations. The price was not for the arbitrator to decide. The arbitrator should have declared that the second option had lapsed. In *Wisma Sime Darby Sdn Bhd v. Wilson Parking Malaysia Sdn Bhd* [1996] 4 CLJ 194; [1996] 2 MLJ 81, it was held that the phrase "a rent to be agreed" was void for uncertainty, as the agreement did not provide a machinery or formula which the court could utilise to ascertain what was otherwise unascertainable without the agreement of the parties.

[77] The wrong formula was used to value the shares. Clause 2.02(e) provided that the price "shall be based on the current value". Adam & Co relied on the NTA method which was contrary to cl. 2.02(e). Net tangible value, which was not stipulated in the agreement, was more favourable to Majlis. A valuation contrary to agreement is not valid (*Jones v. Sherwood* [1992] 2 All ER 170 at 179).

[78] The wrong principles of assessment of damages were applied. The sum payable on the options was deducted from the RM97,692,957 awarded for the shortfall in dividends. The arbitrator failed to appreciate that dividends are paid from the funds of a company which could not be used to buy its own shares (learned counsel cited s. 67 of the Companies Act 1965 and *Belmont Finance Corporation v. Williams Furniture (No. 2)* [1980] 1 All ER 393). The technique by the arbitrator, for to find that the options shares had been paid, was prohibited by law.

[79] Majlis claimed the dividends it could have received from 2002 to 2010. By 2002, Majlis had 33% equity. Clause 2.02(k) provided that the final say on dividends lay with Majlis. Therefore, all dividends declared had the consent of Majlis. Yet the arbitrator re-allocated the dividends which had the consent of Majlis. Failure of the arbitrator to refer to cl. 2.02(k) was a serious misconstruction of a material clause, as in *Intelek Timur*.

[80] When it was ruled that the capital increase was unlawful and should be cancelled, the arbitrator should have ordered Far East to return the dividends (*Re Cleveland Trust Plc Ltd* [1991] BCLC 424 and *Re Exchange Banking Co* [1882] 21 Ch. D. 519). The re-allocation was on the assumption that the options had been exercised. But that assumption was wrong, as it was open to Majlis to take up a part of the option shares. Contrary to company

law, the arbitrator ordered the funds of the company (KAOP) to pay for its own shares. Dividends are paid according to the amount paid by the shareholder (learned counsel cited s. 56(1)(c) of the Companies Act 1965). As the consideration had not been paid, the order to transfer the option shares was an error that substantially affected Far East.

[81] Assessment of damages on wrong principles is always a ground to set aside and re-assess an award of damages, if liability is sustained (*Davies v. Powell Duffryn Collieries* [1942] AC 601). Misapplication of law in the assessment of damages had substantially affected the rights of Far East and KAOP.

Majlis' Submissions

[82] The principle of minimal interference by the court, which is an ingrained aspect of the UNCITRAL Model Law on International Commercial Arbitration, is reflected in s. 8. That principle was accepted in *Perwira Bintang*, *Government Of The Lao People's Democratic Republic v. Thai-lao Lignite Co Ltd ("TLL"), A Thai Company & Anor* [2013] 1 LNS 83; [2014] 2 AMR 375, *Ajwa For Food Industries, Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83, *Rmarine Engineering (M) Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 7 CLJ 540, and *Chain Cycle*. The model law requires recognition of the principles of party autonomy, minimal court intervention and international harmonisation of laws. In the context of the Model Law regime, the better view would be against the old "error on the face of the award" rule. That was the position in *Exceljade* and *Perwira Bintang*. The non-interventionist approach was captured in *Government of India v. Cairns Energy*. It is settled that an arbitration award is final and can only be challenged in exceptional circumstances (*Intelek Timur, Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal* [2015] 8 CLJ 58; [2015] 4 MLJ 766). A wrong inference of fact is not sufficient to set aside an award. Courts do not exercise appellate jurisdiction over arbitration awards (*Pembinaan LCL Sdn Bhd v. SK Styrofoam (M) Sdn Bhd* [2007] 3 CLJ 185; [2007] 4 MLJ 113). The jurisdiction to set aside or remit an arbitrator's award is one that should be exercised with care (*Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788; [1999] 2 MLJ 481). Lack of appraisal of the law is not a legitimate ground to set aside or remit an award. There must be a serious failure to analyse and appraise material and relevant evidence which affected the award (*Sami Mousawi Utama Sdn Bhd v. Kerajaan Negeri Sarawak* [2004] 2 CLJ 186, *Sharikat Pemborong Pertanian & Perumahan*). The arbitral tribunal should be the master of the facts and procedure (*Majlis Amanah Rakyat v. Kausar Corporation*). A court can intervene when the award is tainted with illegality (*Government of India v. Cairns Energy*). Findings of fact by an arbitral tribunal, which are not illogical, unconscionable or perverse, have not been interfered with.

[83] Section 42 calls for further judicial comment. As to what amounts to a question of law, *Tune Insurance Malaysia* had it (i) that the question must be identified with sufficient precision (*Taman Bandar Baru Masai Sdn Bhd v. Dindings Corporations Sdn Bhd* [2010] 5 CLJ 83), (ii) that the question must arise from the award (*Majlis Amanah Rakyat v. Kausar Corporation*), (iii) that the party referring the question must satisfy the court that a determination of the question will substantially affect his rights, (v) that the question of law must be a legitimate question of law and not a question of fact dressed up as a question of law (*Georgas SA v. Trammo Gas Ltd (The Baleares)* [1993] 1 Lloyd's Rep 215), (vi) that a reference must be dismissed if a determination of the question of law will not have a substantial effect on the right of the parties (*Exceljade*), (vii) that jurisdiction should be exercised only in clear and exceptional circumstances, or where the decision is perverse (*Lembaga Kemajuan Ikan*), (viii) that intervention by the court must be only if the award is manifestly unlawful and unconscionable, and (ix) that the arbitral tribunal remains the sole arbiter of fact and evidence (*Gold and Resource Developments (NZ) Ltd v. Doug Hood Ltd* [2000] 3 NZLR 318).

[84] *Exceljade* decided that the test for setting aside awards under s. 24 of AA 1952 is no longer applicable to s. 42 which is completely different. *Exceljade* lay down the correct approach. *Perwira Bintang* held that the approach in *Exceljade* should be preferred. The old jurisprudence on 'error of law on the face of the award' had been rejected.

[85] The rule in *Turquand* was not raised in the arbitral proceedings, because Far East and KAOP took the stand that the allotment was in accordance with the memorandum and articles. *Hubah* was not relevant to the instant case. In *Penang Development Corporation v. Teoh Eng Huat & Anor* [1992] 1 CLJ 476; [1992] 3 CLJ (Rep) 204; [1992] 1 MLJ 749, the rule in *Turquand* was invoked because of the conduct and action taken by the corporation. In the instant case, there was not an iota of evidence that Majlis consented to the allotment. It was unchallenged evidence (of witness CW1) that the allotment was never discussed at any of the meetings of Majlis. It was the finding of the arbitrator that Majlis had no knowledge of the allotment until much later. There were no facts to apply the rule in *Turquand*.

[86] Majlis, being a creature of statute, must act in accordance with the Enactment *(Malaysia Shipyard and Engineering Sdn Bhd v. Bank Kerjasama Rakyat Malaysia Bhd* [1985] 1 LNS 166; [1985] 2 MLJ 359, *Chase Manhattan Bank NA v. Mercantile Co-operative Thrift & Loan Society Ltd* [1992] 3 CLJ 1346; [1992] 1 CLJ (Rep) 35; [1992] 2 MLJ 168).

[87] The rule in *Turquand* could also not apply for the following reasons: (i) the actions by Far East and KAOP were not in good faith, (ii) Far East and KAOP were aware of the provisions of the Enactment, (iii) it was the finding of the arbitrator that Far East had all intention to renege on the agreement.

[88] The adverse inference was rightly invoked. The issue on the allotment was not resolved by invocation of the adverse inference. Section 2 of the Evidence Act 1950 provides that the strict rules of evidence do not apply to arbitration proceedings. In *Russell v. Northern Bank Development Corp Ltd*, the House of Lords decided that the undertaking of the company was enforceable by the shareholders *inter se* as a personal agreement. In construing an agreement, a court is not confined to the four corners of the document. The court is entitled to look at the factual matrix (*Attorney-General of Bellize & Ors v. Bellize Telecom Ltd* [2009] 2 All ER 1127; *Berjaya Times Square, Hotel Anika Sdn Bhd v. Majlis Daerah Kluang Utara* [2006] 4 CLJ 981; [2007] 1 MLJ 248). A contract must be interpreted which would avoid absurdity, inconsistency or repugnancy (*Malaysian Newsprint Industries Sdn Bhd v. Perdana Cigna Insurance Bhd & Ors* [2008] 1 CLJ 246; [2008] 2 MLJ 256), and which would make commercial sense (*Damansara Realty Bhd v. Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 9 CLJ 257) and business logic (*Bon Chong Hing & Anor v. Gama Trading Company (Hong Kong) Ltd* [2011] 6 CLJ 493; [2011] 4 MLJ 52).

[89] Limitation was not pleaded by Far East and KAOP. The arbitrator was correct to hold that the challenge to the impugned allotment was not barred by limitation. The rule in *Turquand* was also applicable to the letter dated 24 December 2002. Far East could not say that the letter dated 24 December 2002 was written without the authority of the board. Whether time was intended to be truly of the essence must be determine by reference to the other provisions of the agreement (*Berjaya Times Square* at 704) and the conduct and dealings of the parties (*Damansara Realty Bhd v. Bungsar Hill Holdings* at 271). Once time for completion was allowed to pass and parties went on to negotiate, then the conduct amounted to a waiver on time being of the essence (*Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 LNS 201; [1969] 1 MLJ 245 and *Berjaya Times Square*). It was a synallagmatic contract, where there were mutual obligations and time was therefore not of the essence (*United Scientific Holdings Ltd v. Burnley Borough Council* [1978] AC 904 and *Sime Hok Sdn Bhd v. Soh Poh Sheng* [2013] 2 CLJ 615; [2013] 2 MLJ 149).

[90] The second option was not void for uncertainty. It was not raised before the arbitrator that the second option was void. Since the machinery for valuation was provided, the court could substitute other machinery to ascertain the price (*Sudbrook Trading Estate Ltd v. Eggleton & Ors* [1983] AC 444 and *Pacific Forest Industries Sdn Bhd & Anor v. Lin Wen Chih & Anor* [2009] 6 CLJ 430; [2009] 6 MLJ 293).

Submission By The Bar Council

[91] In essence, the Bar Council was of the view that court intervention should be at a minimal, that the point of reference would be whether the award or any part of it is obviously wrong, that the question of law to be decided cannot be anything else, that *Chain Cycle* indicated that the *Absalom*

principle should be retained, that an application under s. 42 is not an appeal, that a question of law must be a pure question of law, and that 'patent injustice', 'manifestly unlawful', 'unconscionable', 'perverse decision', and 'illegality', are instances or circumstances where the court found the decisions of the arbitrator as being outside the 'range of correct answers' to warrant the setting aside or variation of the award, but are not applicable tests under s. 42.

Our Decision

Historical Background

[92] Before AA 1952, arbitration in the states of Malaya was governed by the Arbitration Ordinance 1950 which was based on the English Arbitration Act 1889. The UK Arbitration Act 1950, which consolidated and amended arbitration law in England and Wales, was followed in British North Borneo and Sarawak in their respective Ordinances of 1952 but was not applied in Malaya until 1972. On 1 November 1972, the Sarawak Ordinance 5 of 1952, which was a carbon copy of the UK Arbitration 1950, was revised as AA 1952 and extended to West Malaysia. The UK Arbitration Act 1979, which amended the UK Arbitration Act 1950, was not followed.

AA 2005

[93] In 1985, the Model Law on International Commercial Arbitration (Model Law) was passed by the United Nations Commission on International Trade Law (UNCITRAL). AA 2005 "was based on the ... Model Law ... The Arbitration Act 2005 (Act 646) repealed and replaced the Arbitration Act 1952 (Act 93) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards Act 1985 (Act 320) ..." (*Albilt Resources Sdn Bhd v. Casaria Construction Sdn Bhd* [2010] 7 CLJ 785; [2010] 3 MLJ 656 per Low Hop Bing JCA, delivering the judgment of the court; see also *Malaysian Newsprint Industries Sdn Bhd v. Bechtel International, Inc & Anor* [2008] 1 LNS 222; [2008] 5 MLJ 254). But more than just repealed and replaced, AA 2005 reformed the law relating to domestic arbitration and provided for international arbitration, the recognition and enforcement of awards and for related matters. Wholesale changes were brought about.

[94] Before AA 2005, in relation to the setting aside of an award, s. 24 of AA 1952 provided:

> (1) Where an arbitrator or umpire has misconducted himself or the proceedings, the High Court may remove him.
>
> (2) Where an arbitrator or umpire has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside.
>
> (3) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into court or otherwise secured pending the determination of the application.

[95] Under AA 1952, the ground to set aside an award was provided in the aforesaid s. 24(2). But the law came to accept that the common law ground of error on the face of the award/record was also available. In *Shanmugan Paramsothy v. Thiagarajah Pooinpatarsam & Ors* [2001] 8 CLJ 683; [2001] 6 MLJ 305, KC Vohrah J, as he then was, imparted the following historical development:

> Nowhere in the Act has the remedy of 'error of law on the face of the award' been provided. In 1971, in *Sharikat Pemborong Pertanian & Perumahan v. Federal Land Development Authority* [1971] 2 MLJ 210, an arbitration matter came up before the High Court and obviously, although the legislation under which the matter was brought up before the court was not mentioned in the judgment, the legislation under which the court took cognizance of the matter was the Arbitration Ordinance 1950 (now repealed). Under that Ordinance, there was also no provision made in regard to the remedy of error of law on the face of the record. Nevertheless, Raja Azlan Shah J (as he then was) had this to say at p 211:
>
> > It is essential to keep the distinction between a case where a dispute is referred to an arbitrator in the decision of which a question of law becomes material from the case in which a specific question of law has been referred to him. The wealth of authorities make a clear distinction between these two classes of cases and they decide that in the former case the court can interfere if and when any error appears on the face of the award but in the latter case no such interference is possible upon the ground that the decision upon the question of law is an erroneous one. Instances of the former are afforded by *Absalom Ltd v. Great Western (London) Garden Village Society Ltd* [1933] AC 592, *British Westinghouse Electric & Manufacturing Co Ltd v. Underground Railways Co of London Ltd* [1912] AC 673, *Hodgkinson v. Fernie 3 CB (NS)* 189; 140 ER 712, and *Attorney General for Manitoba v. Kelly and Ors* [1922] 1 AC 268 at p 281 (PC), *Government of Kelantan v. Duff Development Co Ltd* [1923] AC 395 at p 411 and *Re King & Duveen* [1913] 2 KB 32 are instances of the latter.
>
> > In the present case, I have on consideration come to the conclusion that no question of law was referred. What was submitted to the arbitrator was a question of law which incidentally, and indeed necessarily, arose in applying ascertained facts. The reference involved both composite questions of law and fact. The court can therefore review the award if and when there is error apparent on the face of the award.
>
> It is implicit that his Lordship was of the view that the remedy of error of law may be resorted to notwithstanding an absence of a provision for that remedy in the Arbitration Ordinance 1950. It has to be borne in mind that the relevant English cases before the coming into force of the English Arbitration Act 1979 ('the 1979 Act') were decided on the basis of common law although there was existing legislation and there was no provision therein for this common law remedy. The 1979 Act abolished this remedy (more about this later).

The Supreme Court in 1972, in *Pacific & Orient Insurance Co Sdn Bhd v. Woon Shee Min* [1980] 1 MLJ 291 considered an arbitration matter where obviously the Act was considered. The Federal Court was fully aware that the Act does not provide for the remedy of error of law on the face of the award but the court, nevertheless, considered the case on the basis that the remedy is available under our law. The court did not allow the appeal against the judgment of the High Court, Johore Bahru dismissing an application by the appellant company to set aside the award of the arbitrator.

This is what Wan Sulaiman FJ stated:

> After hearing evidence from both sides the arbitrator Mr Chelliah Paramjothy, a senior lawyer, gave his award on 20 July 1976.
>
> Upon the basis that the respondent has a right to be indemnified by the appellant company for the damage to motor vehicle his award was that the appellants should pay to the respondent the sum of RM8,000 'on a total loss basis' for the motor vehicle. Section 24(2) of the Arbitration Act reads 'where an arbitrator … has misconducted himself or the proceedings, or an arbitration or award has been improperly procured, the High Court may set the award aside'. This subsection is almost identical in wording with the English s 23(2).
>
> However, it appears from Mr Ball's opening words that it is not on this ground that the appellants depended to have the award set aside but on the inherent power of the court to set aside an award which is bad on the face of it, as involving an apparent error in fact or in law. (See *Russell on Arbitration* (18th Ed) p 349). At p 357 of the same volume appears this passage:
>
> > An award which, on its face, fails to comply with the requirements of a valid award, will be remitted or set aside. By a somewhat anomalous extension of this rule, notwithstanding that an arbitrator's decision is in general final, if an error either of fact or law is allowed to happen on the face of the award, this is a ground for setting it aside …'
>
> Over the years, the courts in Malaysia have regularly considered arbitration applications on the basis that the remedy of error on the face of the award is available for consideration under our law. In *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1988] 1 MLJ 428, the Supreme Court referred to *Sharikat Pemborong Pertanian & Perumahan* and accepted that the remedy of error of law on the face of the award is available to be considered. In a more recent case, *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 MLJ 481 at p 488, the Court of Appeal recognised that the jurisdiction of the ordinary courts in the environment of private arbitration stems from statute and common law.

[96] Thus, under AA 1952, "there are two grounds for the court's intervention namely, under the common law where there is an error of law on the face of an award and for misconduct by an arbitrator under s. 24(2)

of the Act" (*Federal Flour Mills Bhd v. FIMA Palmbulk Service Sdn Bhd & Another Appeal* [2005] 4 CLJ 47; [2005] 6 MLJ 525, per Arifin Zakaria FCJ, as he then was, delivering the judgment of the court). That jurisdiction to set aside an award on the ground of 'error of law on the face of the award' "exists at common law independently of statute" (*Halsbury's Laws of England* (4th edn) vol. 2 para 623).

[97] The general rule at common law is that, absent a contrary intention in the agreement to arbitrate entered into between the parties to a controversy, the award of an arbitrator is final, binding and conclusive. It may not be challenged merely on the ground that it is erroneous … So jealously did the common law guard against curial interference with private arbitrations that it was most reluctant to create exceptions to the general rule ... the common law as a very limited exception grudgingly allowed a court to intervene and set aside an award on the face of which there appeared an error of law (*Hartela* at pp. 794-795 (CLJ); p. 488 (MLJ) per Gopal Sri Ram JCA, as he then was, delivering the judgment of the court)

AA 2005 And 'Error Of Law On The Face Of The Award'

[98] But under AA 2005, the grounds for setting aside an award could not be more different. Two provisions provide for the setting aside of domestic awards. Section 37(1) of AA 2005 provides:

> (1) An award may be set aside by the High Court only if:
>
> (a) the party making the application provides proof that:
>
> (i) a party to the arbitration agreement was under any incapacity;
>
> (ii) the arbitration agreement is not valid under the law to which the parties have subjected it, or, failing any indication thereon, under the laws of Malaysia;
>
> (iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present that party's case;
>
> (iv) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration;
>
> (v) subject to subsection (3), the award contains decisions on matters beyond the scope of the submission to arbitration; or
>
> (vi) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Act from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Act; or

(b) the High Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the laws of Malaysia; or

(ii) the award is in conflict with the public policy of Malaysia.

[99] Section 42(1)-(4) of AA 2005 (Part III of AA 2005 applies to all domestic arbitration unless the parties agree otherwise in writing) provide:

(1) Any party may refer to the High Court any question of law arising out of an award.

(1A) The High Court shall dismiss a reference made under subsection (1) unless the question of law substantially affects the rights of one or more of the parties.

(2) A reference shall be filed within forty-two days of the publication and receipt of the award, and shall identify the question of law to be determined and state the grounds on which the reference is sought.

(3) The High Court may order the arbitral tribunal to state the reasons for its award where the award:

(a) does not contain the arbitral tribunal's reasons; or

(b) does not set out the arbitral tribunal's reasons in sufficient detail.

(4) The High Court may, on the determination of a reference:

(a) confirm the award;

(b) vary the award;

(c) remit the award in whole or in part, together with the High Court's determination on the question of law to the arbitral tribunal for reconsideration; or

(d) set aside the award, in whole or in part.

AA 2005 And The Law Developed Under AA 1952

[100] Given the radical change, *The Arbitration Act 2005* by Sundra Rajoo and WSW Davidson at p. 5 thus matter-of-factly commented that the substantial body of case law developed under AA 1952 is no longer relevant:

> In the past, because of the close identity between the English Act of 1950 and the 1952 Act, the Malaysian courts have tended to rely upon English case law for guidance, although over the years there has developed a substantial body of local case law. A good deal of this body of case law is now no longer relevant. We should stress however that the English 1996 Act, although not following the Model Law format, does follow many of the broad principles which are embodied in the Model Law and many decisions of the English courts under the 1996 remain relevant and persuasive for the interpretation of the Act. Before relying on any such

A decisions, a necessary step should always be to compare the wording of the section in which the decision was based and assess the relevance in the light of the similarities and differences. The same applies to authorities from other Commonwealth jurisdictions.

[101] In support of its view that the substantial body of case law developed B under AA 1952 is no longer relevant, *The Arbitration Act 2005 supra* at p. 5 cited *Sundaram Finance Ltd v. NEPC India Ltd* [1999] 1 LRI 69, where faced with a similar radical change of statutory regime the India Supreme Court commented that the provisions of the Indian Arbitration Act 1996 have to be interpreted and construed independently, quite without reference to the C Indian Arbitration Act 1940:

> … the 1996 Act [equivalent of the Act] is very different from the Arbitration Act 1940 [equivalent of the 1952 Act]. The provisions of this Act have, therefore, to be interpreted and construed independently and in fact reference to 1940 may actually lead to misconstruction. In other words, the provisions of the 1996 Act have to be interpreted being D uninfluenced by the principles underlying the 1940 Act. In order to get help in construing these provisions, it is more relevant to refer to the UNCITRAL Model Law rather than the 1940 Act.

[102] Local courts took a bit longer to form the view that the test previously applied for the setting aside awards no longer applied. In *Majlis Amanah* E *Rakyat v. Kausar Corporation*, Mohamad Ariff J, as he then was, held that the jurisdiction under s. 42 is in line with the jurisprudence on error of law on the face of the record:

> In my view, the emphasis on the words 'arising out of an award' is a pertinent one. A question of law must arise out of an award, and not out F of the arbitration. As such, the jurisdiction conferred on the court should be a limited one, more in line with the jurisprudence on error of law on the face of the award.

[103] In *Maimunah bt Deraman*, Mohamad Ariff J repeated "that the principles applicable to error of law on the face of the award should continue G to apply in the context of s. 42".

[104] In *Lembaga Kemajuan Ikan*, Mary Lim J, as she then was, agreed with Mohamad Ariff J and said that the jurisdiction under s. 42 "ought to be applied only in clear and exceptional cases. The principles envisaged are akin to error on the face of the award". H

[105] But a very different view was expressed in *Exceljade*, where Nallini J, as she then was, held that the test for the setting aside awards under AA 1952 could not be extended to AA 2005:

> Under the previous s. 24 of the repealed Arbitration Act 1952, the test for I setting aside awards under the section was whether an error of law on the face of the record arose … That section being repealed, it would follow that the test previously applied in respect of the repealed s. 24 ought not logically be extended or utilised in respect of the new s. 42 …

A comparison of the two sections, namely s. 24 of the repealed Arbitration Act 1952 and the present s. 42 are quite evidently different and distinct. Section 42 allows 'any question of law arising out of an award' to be brought by 'any party' by way of a reference to the High Court. Given the clearly wider ambit of this section, as compared to the prior s. 24 of the repealed Arbitration Act, it is evident that the question that a court needs to ask itself is whether the question framed before it is indeed a question of law.

[106] Mohamad Ariff, by then JCA, in *Perwira Bintang* conceded that the view in *Exceljade* on s. 42 should be preferred and that the jurisprudence on 'error of law on the face of the award' should be rejected.

Since this case was decided, Parliament has inserted sub-s. (1A) to s. 42, such that as a matter of statutory interpretation, the court is now cautioned against setting aside or varying an award unless the error of law substantially affects the rights of parties …

…

The statutory wording mandates the court to dismiss ('shall dismiss') the reference on the question of law unless the question of law affects in a substantial way the rights of the party or parties …

With the amendment, and reading the provision in its overall context, the views expressed in *Exceljade*, should perhaps now be preferred. However, on the special facts of a particular appeal, the previous jurisprudence and the new law may just overlap. This is the position taken by the appellant. Counsel for the appellant submits:

> It is submitted that regardless of whether the test for section 42 of the AA 2005 is error of law arising out of an award or question of law arising out of the award, the Malaysian authorities recognises that the arbitrator is the master of facts.

Nevertheless, the *Exceljade* approach will align our law with that of other jurisdictions where the old jurisprudence on 'error of law on the face of the award' has been rejected.

[107] *Exceljade* was also endorsed in *Chain Cycle*, where Varghese George JCA, delivering the judgment of the court, held that what amounts to a question of law under s. 42 was settled by *Exceljade*, and in *Tune Insurance Malaysia*, where Hasnah Hashim J, as she then was, cited with approval the statement of law in *Exceljade* that the test for setting aside awards under AA 1952 could not be extended to AA 2005.

[108] The Federal Court also accepted that AA 2005 must be interpreted and construed independently. In *Press Metal Sarawak Sdn Bhd v. Etiqa Takaful Bhd* [2016] 9 CLJ 1; [2016] 5 MLJ 417, it was held by Ramly Ali FCJ, delivering the judgment of the court, that s. 10(1) of AA 2005 is not tied to s. 6 of AA 1952:

Prior to the 2005 Act, the applicable law was the Arbitration Act 1952 ('the 1952 Act'). The issue of stay of proceedings in the 1952 Act was dealt with under s. 6 thereof which reads:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The clear effect of the present s. 10(1) of the 2005 Act is to render a stay mandatory if the court finds that all the relevant requirements have been fulfilled; while under s. 6 of the repealed 1952 Act, the court had a discretion whether to order a stay or otherwise.

What the court needs to consider in determining whether to grant a stay order under the present s. 10(1) (after the 2011 Amendment) is whether there is in existence a binding arbitration agreement or clause between the parties, which agreement is not null and void, inoperative or incapable of being performed. The court is no longer required to delve into the details of the dispute or difference (see *TNB Fuel Services Sdn Bhd*). In fact the question as to whether there is a dispute in existence or not is no longer a requirement to be considered in granting a stay under s. 10(1). It is an issue to be decided by the arbitral tribunal.

[109] That the provisions of AA 1952 are not applicable under AA 2005 was also impliedly said in *TNB Fuel Services Sdn Bhd v. China National Coal Group Corp* [2013] 1 LNS 288; [2013] 4 MLJ 857, where Anantham Kasinather JCA, delivering the judgment of the court, said:

> With respect, the learned High Court judge, in our judgment, considered the merits of the respondent's application for the injunction on the basis of the Arbitration Act 1952 and not the Arbitration Act 2005, which ought to have been the case.
>
> … the learned trial judge erred in not considering the application for the injunction on the basis of sub-s 9(5) of the Arbitration Act 2005 ... if the learned trial judge had applied s. 9(5) of the Act to these facts, we are of the considered opinion that Her Ladyship would have come to the conclusion that the 'arbitration agreement' was binding on the parties.

[110] With respect, we could not agree with the statement in *Exceljade* that "under the previous s. 24 of the repealed Arbitration Act 1952, the test for setting aside awards under the section was whether an error of law on the face of the record arose". 'Error of law on the face of the award' was the common law ground to set aside an award (see *Halsbury's Law of England* 4th edn, vol. at paras 621 & 623). "Where an arbitrator or umpire has misconducted himself or the proceedings" was the statutory ground to set aside an award. Those two grounds, one under common law the other under AA 1952, as

different as chalk and cheese, could not be equated as the one and the same. But we share the view that with the radical change to the statutory regime, that s. 24 of AA 1952 and the law developed thereunder are not relevant under s. 42. It would only follow that all decisions made under s. 42 but yet applied the law developed under s. 24 of AA 1952 and the decisions that followed them were wrongly decided on law and should not be followed.

AA 2005 And 'Error Of Law On The Face Of The Award

[111] Section 8 provides that "No court shall intervene in matters governed by this Act, except where so provided in this Act". That was read to mean "minimal intervention consistent with the policy underlying the UNCITRAL Model Law" (*Perwira Bintang).* In *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (M) Sdn Bhd & Anor* [2015] 1 LNS 703; [2015] 10 MLJ 689, Mary Lim J, as she then was, held that "there is still room left for the continued application of the error of law on the face of the award test":

> In any case, there is still room left for the continued application of the error of law on the face of the award test. The test has its roots under common law. The preponderance of the test led to deliberate legislative intervention in other jurisdictions while that is not the case here. I do not find any express statutory provision excluding that test quite unlike the position in the United Kingdom. For example, in the UK 1979 Arbitration Act, s. 1 deals with 'judicial review of arbitration awards', and sub-s. 1(1) expressly states:
>
> > 1(1) In the Arbitration Act 1950 (in this Act referred to as 'the principal Act') section 21 (statement of case for a decision of the High Court) shall cease to have effect and, without prejudice to the right of appeal conferred by subsection (2) below, the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award.
>
> This statutory policy is maintained in the UK 1996 Arbitration Act in sub-s. 81(2) which reads as follow:
>
> > Nothing in this Act shall be construed as reviving any jurisdiction of the Court to set aside or remit an award on the ground of errors of fact or law on the face of the award.
>
> There are no comparable provisions in our Act 646 that either mirrors or comes close to the clear express language of sub-s. 1(1) in the 1979 Act or sub-s. 81(2) in the 1996 Act. I do not believe there is any room for making any necessary inference either. Although this court may be prepared to bring this area of law alongside the mainstream approaches under model law, I am reminded that the courts are only interpreters and not legislators of the law. Even in the case of the United Kingdom, the court's practice and approach changed because of legislative intervention.

[112] In the United Kingdom, 'error of fact or law' is no longer a ground to set aside an award (see *Halsbury's Laws of England* 4th edn, (Reissue) vol 2 at para 692 footnote 3). Until rendered ineffective by s. 1(1) of the UK Arbitration Act 1979, s. 21(1) of the UK Arbitration Act 1950 provided that "An arbitrator or umpire may, and shall if so directed by the High Court, state – (a) any question of law arising in the course of the reference; or (b) an award or any part of an award, in the form of a special case for the decision of the High Court". Section 1(1) of the UK 1979 Arbitration Act provided that "the High Court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the ground of errors of fact or law on the face of the award". When the UK Arbitration Act 1950 was repealed, s. 81(2) of the UK Arbitration 1996 affirmed that "Nothing in this Act shall be construed as reviving any jurisdiction of the court to set aside or remit an award on the ground of errors of fact or law on the face of the award". There is an equipollent provision in Singapore, Australia, and Canada.

[113] Section 81(2) of the UK Arbitration Act 1996 ousted the jurisdiction of the court "to set aside or remit an award on the ground of errors of fact or law on the face of the award". In the United Kingdom, "appeal to the court on a question of law arising out of an award made in the proceedings" (s. 69(1) of the UK Arbitration Act 1996) could not be allowed on the ground of errors of fact or law on the face of the award.

[114] AA 2005 is devoid of a provision in the words of s. 81(2) of the UK Arbitration Act 1996. But AA 2005 is nonetheless clear that "No court shall intervene in matters governed by this Act, except where so provided in this Act". Pertinent to "where so provided in this Act", AA 2005 provides for court intervention in the matters stated in ss. 10, 11, 13(7), 15(3), 18(8), 29, 37, 41, 42, 44(1), 44(4), 45, and 46 of AA 2005. "Where a party seeks intervention is one of those situations, the court is permitted to intervene only in the manner prescribed by the Model Law, and in the absence of any express provision the court must not intervene at all. By contrast, where the situation is not of a type to which the Model Law is addressed, the court may intervene or decline to intervene in accordance with the provisions of the relevant domestic arbitration law" (A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary by Howard M. Holtzmann & Joseph E. Neuhaus, published 1994 at 224). Accordingly, s. 8 "would … not exclude court intervention in any matter not regulated by [AA 2005]" (*The Arbitration Act 2005 supra* at 8.17); matters which are not governed by the Model Law include the following areas: the inherent jurisdiction in the court to grant an injunction to stay arbitral proceedings; and the whole topic of confidentiality of arbitral proceedings (for a non-exhaustive list of matters not governed by the Model Law, see *A Guide to the UNCITRAL Model Law on International Commercial Arbitration supra* at 218).

[115] But "… in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act …" (*LW Infrastructure Pte Ltd v. Lim Chin San Contractors Pte* [2012] SGCA 57 per Sundaresh Menon JA, as he then was, delivering the judgment of the court). Since the setting aside of an award is a matter governed by AA 2005, the court is permitted to set aside an award only in manner prescribed by AA 2005. The court is not permitted to set aside an award in manner not prescribed by AA 2005. 'Error of fact or law on the face of the award' is not prescribed as a ground for court intervention. Hence, under AA 2005, there is no jurisdiction to set aside an award on the ground of 'error of fact or law on the face of the award'. It is accepted that under AA 1952, the jurisdiction for court intervention stemmed from both common law and statute. But under AA 2005, "the common law ground of setting aside an award for 'error on the face of the award' no longer exists" (*The Arbitration Act supra* at 8.23(b)).

General Reference And Specific Reference

[116] With the common law jurisdiction of setting aside an award for 'error on the face of the award' gone, the distinction between a general reference and a specific reference, though pertinent under AA 1952 (see *The Government of India v. Cairn Energy* at [29] and [33]), is not relevant.

Test Under s. 42

[117] Under s. 42(1), any party may refer to the High Court "any question of law arising out of an award". And under s. 42(1A), "The High Court shall dismiss a reference made under sub-s. (1) unless the question of law substantially affects the rights of one or more of the parties". The question of law must not only arise out of the award, but must substantially affect the rights of one or more of the parties. Short of one and the reference shall be dismissed.

[118] An award might or might not be perverse, unconscionable, unreasonable, and the like. But it only matters whether there is a question of law arising out of the award that substantially affects the rights of one or more of the parties. Under s. 42, that is the only ground for the court to intervene. Perverse, unconscionable, unreasonable, and the like are not tests for the setting aside of an award. The so-called guidelines (g) "This jurisdiction under s. 42 is not to be lightly exercised, and should be exercised only in clear and exceptional cases"; (h) "Nevertheless, the court should intervene if the award is manifestly unlawful and unconscionable"; and (j) "While the findings of facts and the application of legal principles by the arbitral tribunal may be wrong (in instances of findings of mixed fact and law), the court should not intervene unless the decision is perverse", stated in *Perwira Bintang* are not in line with s. 42 and should not be followed.

'Question Of Law'

[119] There is no local authority on what is a 'question of law' in the context of s. 42. Foreign authorities are at hand. But before we delve into those foreign authorities, we should first underscore that in Singapore, United Kingdom, Australia, New Zealand, and Canada, an appeal on a question of law arising out of an award could not be brought except with the agreement of the parties to the proceedings, or with leave of the court.

[120] In the United Kingdom, an appeal on a question of law arising out of an award made in the proceedings "shall not be brought except (a) with the agreement of all the other parties to the proceedings, or (b) with the leave of the court" (s. 69(2) of the UK Arbitration Act 1996). The right to appeal is also subject to the restrictions in s. 70(2) and (3) of the UK Arbitration Act 1996. Even when it was under the UK Arbitration Act 1950 as amended by the UK Arbitration Act 1979, an appeal on a question of law arising out of an award made on an arbitration agreement could only be brought "(a) with the consent of all the other parties to the reference, or (b) ... with the leave of the court" (s. 1(3) of the UK Arbitration Act 1979).

[121] The position in Singapore, Australia, New Zealand and Canada is no different. A party may appeal to the court on a question of law arising out of an award only with the agreement of the parties to the proceedings or with leave of the court (see s. 49(1) and (3) of the Singapore Arbitration Act 2001; s. 34A(1) of the uniform Commercial Arbitration Acts of New South Wales, Queensland, South Australia, Tasmania, Victoria, West Australia, Australian Capital Territory; cl. 5(1) of Schedule 2 of the New Zealand Arbitration Act 1996; s. 31(1) of the Canada Commercial Arbitration Act 1996).

[122] In all those jurisdictions, an appeal, unless filed with the agreement of the parties, is preceded by an application for leave to appeal. Different considerations apply at the leave stage and at the appeal. That was drawn attention to in *Vinava Shipping Co Ltd v. Finelvet AG "The Chrysalis"* [1983] 2 All ER 658 at 662, where Mustill J thus imparted:

> In the first place, it must be kept in mind that quite different considerations apply to the question whether, in the exercise of its discretion, the court should grant leave to appeal under s. 3 of the 1979 Act from those which are material when the court comes to hear the appeal itself. The first stage is a filtering process, at which the court gives effect to the policy embodied in the 1979 Act and enunciated in *The Nema*, whereby the interests of finality are placed ahead of the desire to ensure that the arbitrator's decision is strictly in accordance with the law. Some examination of the merits takes place at this stage ... But the examination of the law is summary in nature, and does not lead to any definite conclusion. The exercise is discretionary throughout ...

[123] But under s. 42, "any party may refer to the High Court any question of law arising out of an award". Leave of the court is not a prerequisite. Given that leave is not required, a s. 42 reference on 'any question of law arising out of an award' is akin to an appeal on 'a question of law arising out of an award' in the United Kingdom, Singapore, Australia, New Zealand or Canada. The label of the application to court might be different. But both 'reference' and 'appeal' pertain to "question of law arising out of the award". In truth, a s. 42 reference is indistinguishable from an 'appeal on a question of law arising out of an award' under the UK Arbitration Acts of 1979 and 1996, the Singapore Arbitration Act 2001, the Australian uniform Commercial Arbitration Acts, the New Zealand Arbitration Act 1996, or the Canadian Commercial Arbitration Act 1996. Given the similarity in substance between the two, appeals in those jurisdictions, as opposed to applications for leave, are clearly persuasive on the interpretation of 'question of law' and 'arising out of an award' in s. 42.

[124] *The Chrysalis* was an appeal under the UK Arbitration Act 1950 as amended by the UK Arbitration Act 1979. And in *The Chrysalis* at 662-663, Mustill J thus expounded on 'question of law':

> The position when the appeal itself is heard is quite different. Here there is no discretion. **The only issue is whether it can be shown that the decision of the arbitrator was wrong in law.** The court must answer this question yes or no, and, if the answer is yes, the appeal must be allowed however finely balanced the issue may be. It is not only unhelpful but positively misleading to introduce at this stage the questions of degree raised by the *Nema* guidelines, such as whether the award is clearly or obviously wrong, for these are material only to the discretionary process of finding out whether the award should be allowed to come before the court for challenge. (emphasis added)

[125] Mustill J then set out a three-stage test to determine whether the award was wrong in law:

> Starting therefore with the proposition that the court is concerned to decide, on the hearing of the appeal, whether the award can be shown to be wrong in law, how is this question to be tackled? In a case such as the present, the answer is to be found by dividing the arbitrator's process of reasoning into three stages. (1) The arbitrator ascertains the facts. This process includes the making of findings on any facts which are in dispute. (2) The arbitrator ascertains the law. This process comprises not only the identification of all material rules of statute and common law, but also the identification and interpretation of the relevant parts of the contract, and the identification of those facts which must be taken into account when the decision is reached. (3) In the light of the facts and the law so ascertained, the arbitrator reaches his decision.

[126] Mustill J explained that only stage (2) is the proper matter of an appeal under the 1979 Act:

> In some cases, the third stage will be purely mechanical. Once the law is correctly ascertained, the decision follows inevitably from the application of it to the facts found. In other instances, however, the third stage involves an element of judgment on the part of the arbitrator. There is no uniquely 'right' answer to be derived from marrying the facts and the law, merely a choice of answers, none of which can be described as wrong.
>
> The second stage of the process is the proper subject matter of an appeal under the 1979 Act. In some cases an error of law can be demonstrated by studying the way in which the arbitrator has stated the law in his reasons. It is, however, also possible to infer an error of law in those cases where a correct application of the law to the facts found would lead inevitably to one answer, whereas the arbitrator has arrived at another; and this can be so even if the arbitrator has stated the law in his reasons in a manner which appears to be correct: for the court is then driven to assume that he did not properly understand the principles which he had stated.

[127] *Russell on Arbitration* 24th edn at 8-137 agreed that "An appeal on a point of law is possible only in relation to matters falling within (2)".

[128] *The Chrysalis* was applied in appeals under the UK Arbitration Act 1996 (see *Covington Marine Corp and Others v. Xiamen Shipbuilding Industry Co Ltd* [2005] EWHC 2912 (Comm), *Kershaw Mechanical Services Ltd v. Kendrick Construction Ltd* [2006] All ER (D) 21 (Mar), *Wuhan Ocean Economic & Technical Cooperation Co Ltd and Another v. Schiffahrts-Gesellschaft "Hansa Murcia" MBH & Co KG* [2012] EWHC 3104 (Comm), *Geden Operations Ltd v. Dry Bulk Handy Holdings Inc M/V "Bulk Uruguay"* [2014] EWHC 885 (Comm)].

[129] *The Chrysalis* was also applied in the following appeals under the UK Arbitration Act 1996, where 'question of law' was further expounded.

[130] In *Micoperi SrL v. Shipowners' Mutual Protection & Indemnity Association (Luxembourg)* [2011] EWHC 2686 (Comm), Burton J said that "... in order for there to be a successful appeal against an arbitration award, there must be an error of law, and not an error of fact, however egregious".

[131] In *MRI Trading AG v. Erdenet Mining Corporation LLC* [2012] EWHC 1988 (Comm) (affirmed in [2013] EWCA Civ 156), Eder J agreed with Moriarty QC who submitted that when approaching the question of whether an arbitration award reveals an error of law which calls for the award to be set aside, varied or remitted, there are four principles which a court needs to keep carefully in mind:

> a. First, as a matter of general approach, the courts strive to uphold awards. This means that, when looking at an award, it has to be read in a reasonable and commercial way, rather than with a view to picking holes, or finding inconsistencies or faults, in a tribunal's reasoning: see, for example, *General Feeds Imc. Panama v. Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688, at 695; *Kershaw Mechanical Services Ltd v. Kendrick*

Construction Ltd [2006] 4 All ER 79, at 57. This is particularly so when the tribunal comprises market men, since one is not entitled to expect from trade arbitrators the accuracy of wording, or cogency of expression, which is required of a judge: *General Feeds Imc Panama v. Slobodna Plovidba Yugoslavia* [1999] 1 Lloyd's Rep 688, at 695.

b. Secondly, where a tribunal's experience assists it in determining a question of law, such as the interpretation of contractual documents, the court will accord some deference to the tribunal's decision on that question. It will reverse the decision only if satisfied that, despite the benefit of that experience, the tribunal has still come to the wrong answer: *Kershaw Mechanical Services Ltd v. Kendrick Construction Ltd* [2006] 4 All ER 79, at 57.

c. Thirdly, it is for the tribunal to make the findings of fact in relation to any dispute and any question of law arising from an Award must be decided on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators: see *The 'Baleares'* [1993] 1 Lloyd's Rep 215 at 228 which makes clear this is so regardless of whether the court thinks a finding of fact was right or wrong.

d. Fourthly, when a tribunal has reached a conclusion of mixed fact and law, the court cannot interfere with that conclusion just because it would not have reached the same conclusion itself. It can interfere only when convinced that no reasonable person, applying the correct legal test, could have reached the conclusion which the tribunal did: or, to put it another way, it has to be shown that the tribunal's conclusion was necessarily inconsistent with the application of the right test: The *'Sylvia'* [2010] 2 Lloyd's Rep 81 at 54-55. The same extremely circumscribed power of intervention applies when it is complained that a tribunal has incorrectly applied the law to the facts. It is only if the correct application of the law leads inevitably to one answer, and the tribunal has given another, that the court can interfere. Once a court has concluded that a tribunal which correctly understood the law could have arrived at the same answer as the one reached by the arbitrator, the fact that the individual judge himself would have come to a different conclusion is no ground for disturbing the Award: *The Chrysalis* [1983] 1 Lloyd's Rep 503 at 507.

[132] In *White Rosebay Shipping SA v. Hong Kong Chain Glory Shipping Ltd* [2013] EWHC 1355 (Comm), where it was argued "that no reasonable tribunal, properly directed as to the law, could have reached the conclusion that the owners had affirmed the charterparty and therefore the tribunal must have erred in law; see *The Chrysalis*", Teare J held that "To make good this argument the owners must show that a correct application of the law would inevitably lead to only one answer, namely, that there had been no affirmation".

[133] *The Chrysalis* was not cited in *Lesotho Highlands Development Authority v. Impreglio SpA and Others* [2005] UKHL 43. In *Lesotho*, Lord Steyn (Lord Hoffmann, Lord Phillips, Lord Scott and Lord Rodger in agreement) said that a mistake in interpreting the contract is the paradigm of a question of law:

A This view is reinforced if one takes into account that a mistake in interpreting the contract is the paradigm of a "question of law" which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement.

[134] Years earlier, in *Geogas SA v. Tramno Gas Ltd (The "Baleares")* [1993] 1 Lloyd's Rep 215 at 231, Steyn LJ, as he then was, made the following distinction between a question of law in a judicial review and in arbitrations:

B

> what is a question of law in a judicial review case may not necessarily be a question of law in the field of consensual arbitrations.

[135] In an appeal on a question of law arising out of an award, "the only issue is whether it can be shown that the decision of the arbitrator was wrong in law" (*The Chrysalis*). The following Canadian authorities also approached 'question of law' from the angle of the correctness of the award:

C

[136] In *Canada (Director of Investigation and Research) v. Southam Inc.,* [1997] 1 SCR 748 at para 35, the Supreme Court of Canada stated that questions of law are questions about what the correct legal test is:

D

> Briefly stated, questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. A simple example will illustrate these concepts. In the law of tort, the question what "negligence" means is a question of law. The question whether the defendant did this or that is a question of fact. And, once it has been decided that the applicable standard is one of negligence, the question whether the defendant satisfied the appropriate standard of care is a question of mixed law and fact.

E

F

[137] In *Carrier Lumber Ltd. v. Joe Martin & Sons Ltd.* [2003] BCJ No. 1602, Chamberlist J enunciated that a 'question of law' is a question concerning legal effect to be given to an undisputed set of facts:

> A 'question of law' has been defined as a 'question concerning legal effect' to be given an undisputed set of facts. An issue which involves the application or interpretation of a law would fall within this meaning.

G

> In *Canada v. Southam Inc.* (1997), 144 D.L.R. (4th) 1 (S.C.C.), the Court stated at para. 35:
>
> > Briefly stated, questions of law are questions about what the correct legal test is ...

H

> Thus, whether the Arbitrators have jurisdiction to potentially award punitive damages is clearly a pure issue of law. Similarly, a finding by an arbitration board that it would not dismiss a claim for abuse of process is also a question of law because of the nature of the award that would be granted on such a finding being made as such an award would not be compensatory in nature, and would ultimately go to the jurisdiction of the tribunal to make such an award. As I have already indicated, I have concluded that the standard of review by this Court is one of 'correctness'.

I

[138] In *Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd.* [2010] BCJ No. 349, PJ Pearlman J said: A

> The question of whether a decision-maker has jurisdiction to determine a particular matter is usually considered to be a question of law reviewable by a court on a standard or correctness: *Dunsmuir v. New Brunswick* [2008] 1 S.C.R. 190 at para. 50; *Davies v. Canada*, 2005 FCA 41, 25 Admin. LR (4th) 74 at para. 16. B

[139] In *Southam* at [39], the court said that the application of the wrong law is an error law:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law. C

[140] In *I-Netlink Inc. v. Broadband Communications North Inc.* [2017] MBQB 146, Edmond J held that a finding of fact in complete absence of any evidence, constitutes an error of law: D

> This finding by the arbitrator was based on his review of the evidence given by a number of witnesses. Determining whether a party knew or ought to have known a fact necessarily requires a consideration of the evidence which is a question of fact. The application of a legal principle in the context of the relevant facts is a question of mixed fact and law. E
>
> In my view, this finding by the arbitrator is a question of fact.
>
> A finding of fact in the complete absence of any evidence, constitutes an error of law. (see *Domo Gasoline Corp. Ltd. v. 2129752 Manitoba Ltd.*, 2014 MBQB 87, 305 Man.R. (2d) 177; *Society of Specialist Physicians and Surgeons of British Columbia v. The Society of General Practitioners of British Columbia*, 2007 BCSC 1385, 161 ACWS (3d) 812, at paras 19-21 and 40-41). F

[141] In Singapore, since repeal and re-enactment of s. 28 of the Arbitration Act 1953, "the court shall not have jurisdiction to set aside or remit an award on an arbitration agreement on the grounds of errors of law of fact or law on the face of the award" (s. 28(1) of the Singapore Arbitration Act Revised 1985). "The Arbitration (Amendment) Act 1980 introduced into the law of Singapore the provisions of the English Arbitration Act 1979. This amendment abolished the previous jurisdiction of the High Court to set aside or remit an award on an arbitration agreement for errors of fact or law on the face of the award …" (*Invar Realty Pte Ltd v. JDC Corp* [1988] 1 SLR 444 per Chao Hick Tin JC, as he then was). G H

[142] Only the common law ground to set aside or remit an award on the ground of 'errors of fact or law on the face of the award' was abolished. But courts in Singapore took it a step further – "An error in law or failure to act judicially by itself does not confer a right of appeal"; "When an arbitrator I

does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal".

[143] In *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd* [2000] 1 SLR 749, an application for leave to appeal, GP Selvam JC (as he then was) said at [7]:

> Under the present law the court has no jurisdiction to set aside or remit an award on the ground of errors of fact or law on the face of the award.
>
> An appeal to the High Court from an arbitration award is possible provided a question of law arises out of the award. A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is matter of substance the determination of which will decide the rights between the parties. The point of law must substantially affect the rights of one or more of the parties to the arbitration. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court. An application for leave to appeal on the ground that the appeal invokes a question of law must therefore clearly present the question of law on which the court's opinion is sought and should also show that it concerns a term of the contract or an event which is not a one-off term or event: see *The Nema; Pioneer Shipping v. BTP Tioxide* [1982] AC 724.
>
> An error in law or failure to act judicially by itself does not confer a right of appeal. The contractors accordingly failed to show that a question of law arose out of the rejection of the claim for interest. I therefore refused to give leave to appeal.

[144] In *Seino Merchants Singapore Pte Ltd v. Porcupine Pte Ltd* [2000] 1 SLR 99, GP Selvam J expressed an identical view but in a redacted form without "An error in law or failure to act judicially by itself does not confer a right of appeal".

[145] *Ahong Construction* was considered in *Northern Elevator Manufacturing Sdn Bhd v. United Engineers (Singapore) Pte Ltd (No 2)* [2004] 2 SLR 494, an appeal against the grant of leave to appeal, where the Court of Appeal per Choo Han Teck J, delivering the judgment of the court, said that "an erroneous application of law does not entitle an aggrieved party to appeal":

> Section 28 of the Act confers upon the High Court a power to grant leave to appeal against an arbitration award if there is a "question of law", arising from the award, to be determined. As a preliminary point, it is essential to delineate between a "question of law" and an "error of law", for the former confers jurisdiction on a court to grant leave to appeal against an arbitration award while the latter, in itself, does not.
>
> An opportunity arose for comment in *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd* [2000] 1 SLR 749. In that case, G P Selvam JC (as he then was) stated at [7]:

> A question of law means a point of law in controversy which has to be resolved after opposing views and arguments have been considered. It is a matter of substance the determination of which will decide the rights between the parties. If the point of law is settled and not something novel and it is contended that the arbitrator made an error in the application of the law there lies no appeal against that error for there is no question of law which calls for an opinion of the court.
>
> To our mind, a 'question of law' must necessarily be a finding of law which the parties dispute, that requires the guidance of the court to resolve. When an arbitrator does not apply a principle of law correctly, that failure is a mere 'error of law' (but more explicitly, an erroneous application of law) which does not entitle an aggrieved party to appeal.

[146] *Ahong* and *Northern Elevator* were followed in *Permarsteelisa Pacific Holdings Ltd v. Hyundai Engineering & Construction Co Ltd* [2005] 2 SLR 270, *Progen Engineering Pte Ltd v. Chua Aik Kia* [2006] 4 SLR 419, *Dynamic Investments Pte Ltd v. Lee Chee Kian Silas and Ors* [2008] 1 SLR 729, *Tay Eng Chuan v. United Overseas Insurance Ltd* [2009] 4 SLR 1043, and *Prestige Marine Services Pte Ltd v. Marubeni International Petroleum (S) Pte Ltd* [2011] SGHC 270.

[147] But in *Ng Eng Ghee and Ors v. Mamata Kapildev Dave and Ors* [2009] 3 SLR 109, the Court of Appeal per VK Rajah JA, delivering the judgment, declined to apply *Ahong* and *Northern Elevator* to an appeal on a point of law under s. 98(1) of the Building Maintenance and Strata Management Act.

[148] Locally, in *SDA Architects (sued as a firm) v. Metro Millenium Sdn Bhd* [2014] 3 CLJ 632; [2014] 2 MLJ 627, where three separate opinions were delivered, Mohd Hishamudin JCA said that "a proper and valid question of law … [is determined by a consideration of] the propriety of the question that is proposed in the context of the facts of the case as a whole, including the issues that have to be dealt with by the arbitrator. Aziah Ali JCA, said that "an error of law … may give rise to a question of law that may be referred to the court under s. 42 of the Act. I find support from the case of *President of India v. Jadranska Sobodna Plovidba* [1992] 2 Lloyd's Rep 274 QBD which shows that a question of law may be formulated on the basis that an error of law has been occasioned when the arbitrator failed to exercise his discretion judicially in making an award of costs". Hamid Sultan JCA was however of the view that "the exercise of discretion *per se* cannot be posed as a question of law".

[149] In Magna *Prima Construction Sdn Bhd v. Bina BMK Sdn Bhd and Another Case* [2015] 11 MLJ 841, Mary Lim J, as she then was, referred to cl. 5(10) of Schedule 2 of the New Zealand Arbitration Act 1996, *Ahong* and *Northern Elevator*, and said that "from these cases and legislation, it may therefore be said that a question of law refers to 'a point of law in controversy' which requires the opinion or determination of this court. Such question will

include one where there is an incorrect interpretation of the applicable law. It, however, will not include any question as to whether the award or any part of the award was supported by any evidence or any sufficient or substantial evidence; or whether the arbitral tribunal drew the correct factual inferences from the relevant primary facts" (Mary Lim J expressed an identical view in *MMC Engineering Group Bhd & Anor v. Wayss & Freytag (M) Sdn Bhd & Anor* [2015] 1 LNS 703; [2015] 10 MLJ 689).

[150] "The question of law must be one of law and not fact" (*The Arbitration Act 2005 supra* at p. 198). "An error of fact alone is insufficient" (*Dept of Education v. Azmitia* [2015] WASCA 246 per Mazza JA). But there is no universal definition of 'question of law'. Nonetheless, from our survey of the authorities, we would conclude that one of the following, which is not an exhaustive list, would meet the paradigm of 'any question of law' in s. 42:

(a) a question of law in relation to matters falling within (2) of Mustill J's three-stage test;

(b) a question as to whether the decision of the tribunal was wrong (*The Chrysalis*);

(c) a question as to whether there was an error of law, and not an error of fact (*Micoperi*): error of law in the sense of an erroneous application of law;

(d) a question as to whether the correct application of the law inevitably leads to one answer and the tribunal has given another (*MRI Trading*);

(e) a question as to the correctness of the law applied;

(f) a question as to the correctness of the tests applied (*Canada v. Southam*);

(g) a question concerning the legal effect to be given to an undisputed set of facts (*Carrier Lumber*);

(h) a question as to whether the tribunal has jurisdiction to determine a particular matter (*Premiums Brands*): this may also come under s. 37 of AA 2005;

(i) a question of construction of a document (*Intelek*).

[151] Given that AA 2005 does not say so, we could not hold that a 'question of law' must be the same one which the arbitral tribunal was asked to determine (for the UK position, see s. 69(3)(b)) of the UK Arbitration Act 1996).

[152] Section 42 allows any question of law arising from the award. 'Any question of law' is wider than 'a question of law'. Since so, it would seem that s. 42 contemplates a less narrow interpretation of 'question of law'. Unless opted in, s. 42 only applies to domestic arbitration. A less narrow interpretation of 'question of law' in s. 42, as we might have given it, would not widen court intervention in international arbitration. But 'a point of law in controversy which has to be resolved after opposing views and arguments

have been considered' is not a 'question of law' within the meaning of s. 42. There would surely be 'a point of law in controversy' in every case. If 'a point of law in controversy' were a question of law, then there would be a 'question of law' arising in every award. And that, with respect, could not be right.

Question Of Fact

[153] Where it is a question of fact, "The arbitrators (remain) the masters of the facts. On an appeal the court must decide any questions of law arising from the award on the basis of full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the court considers these findings to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be or what the scale of the financial correspondences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact." (the '*Baleares*' at 228). "… on findings of facts an arbitrator is the sole judge. Further, whether he drew the wrong inferences of facts from the evidence itself is not sufficient as a ground to warrant setting aside his award (see *GKN Centrax Gears Ltd v. Matbro Ltd* [1976] 2 Lloyd's Rep 555)" (*Future Heritage Sdn Bhd v. Intelek Timur Sdn Bhd* [2003] 1 CLJ 103; [2003] 1 MLJ 49 per Richard Malunjum JCA, as he then was). "… if an arbitrator had erred by drawing wrong inferences of fact from the evidence before him, be it oral or documentary, that in itself is not sufficient to warrant setting aside of his award. It would be contrary to all the established legal principles relating to arbitration if an award based upon the evidence presented were liable to be reopened on the suggestion that some of the evidence had been 'misapprehended and misunderstood' per Raja Azlan Shah J (as he then was) in *Syarikat Pemborong Pertanian & Perumahan v. Federal Law Development* [1971] 2 MLJ 210" (*Intelek Timur Sdn Bhd v. Future Heritage Sdn Bhd* [2004] 1 CLJ 743; [2004] 1 MLJ 401 per Siti Norma Yaakob FCJ, as she then was, delivering the judgment of the court).

[154] "It is essential therefore to understand the basic difference between appeals in the court system from subordinate courts, where issues of 'weight of evidence' are routinely addressed, and references under s. 42 of the Act, where the court has no jurisdiction to entertain arguments based on weight of evidence ... 'the parties will not be allowed to circumvent the rule that the tribunal's findings of fact are conclusive by alleging that they are inconsistent or they constitute a serious irregularity or an excess of jurisdiction, or on the basis that there was insufficient evidence to support the findings in question. The argument that it is a question of law whether there is material to support a finding of fact is no longer available' (Russell on Arbitration (1997) at 8-057)" (*The Arbitration Act 2005 supra* at pp. 198-199).

[155] At any rate, s. 42 only permits a reference on a discrete question of law. Under s. 42, there is no jurisdiction to deal with questions of fact. As Steyn LJ put it in *The Baleares*, "on an appeal the court must decide any question of law arising from the award based on a full and unqualified acceptance of the findings of fact of the arbitrators". The question of law must accept the findings of facts. Hence, all argument or debate on the findings of fact of the arbitrator, on the inferences drawn by the arbitrator from his findings of fact and or from the evidence could not and would not be entertained.

Is The Construction Of A Document A Question Of Law?

[156] It must be more than settled that the construction of a document is a question of law. In *Munusamy v. Public Services Commission* [1964] 1 LNS 118; [1964] 1 MLJ 239, where on the construction of an article of the Constitution which forbids the dismissal or reduction in rank of certain persons unless a certain condition is complied with, that is that the person concerned be given a reasonable opportunity of being heard, Thomson LJ said "That question of construction is a question of law …". In *Citicorp Investment Bank (Singapore) Ltd v. Wee Ah Kee* [1997] 2 SLR 759, Yong Pung How CJ said "we must approach the construction of the document, which is a question of law, untrammelled by any concession as to the meaning of the agreement that might have been given by the court below". "It is trite that a question of construction is a question of law and not fact (see *Bahamas International Trust Co Ltd & Anor v. Threadgold* [1974] 1 WLR 1514 (HL)" (*Bintulu Development Authority v. Pilecon Engineering Bhd* [2007] 2 CLJ 422; [2007] 2 MLJ 610 per Nik Hashim JCA, as he then was, delivering the judgment of the court). In *Bahamas International Trust Co Ltd v. Threadgold,* Lord Diplock said "that the construction of a written document is a question of law", which was followed in *Tan Suan Heoh v. Lim Teck Ming & Ors* [1985] 1 LNS 12; [1987] 2 MLJ 466, *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96; [2004] 3 MLJ 38, *Silver Concept Sdn Bhd v. Brisdale Rasa Development Sdn Bhd* [2005] 3 CLJ 259; [2005] 4 MLJ 101, *Padiberas Nasional Bhd v. Kontena Nasional Bhd* [2009] 1 LNS 1453; [2010] 3 MLJ 134, and *The Government of India v. Cairn Energy India Pty Ltd & Anor* [2012] 3 CLJ 423; [2011] 6 MLJ 441 and *Tun Dr Mahathir Mohamad & Ors v. Datuk Seri Mohd Najib Tun Hj Abdul Razak (No 2)* [2017] 8 CLJ 350; [2017] 9 MLJ 1). In *Desa Teck Guan Koko Sdn Bhd v. Syarikat Hap Foh Hing* [1994] 3 CLJ 172; [1994] 2 MLJ 246, Ian Chin J opined that "… a question of construction is (generally speaking) a question of law". In *Intelek Timur Sdn Bhd v. Future Heritage* [2004] 1 CLJ 743; [2004] 1 MLJ 401, the Federal Court followed *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1987] 2 CLJ 394; [1987] CLJ (Rep) 95; [1988] 1 MLJ 428, where the Supreme Court adopted the following passage in *Halsbury's Laws of England* (4th edn) vol 2, p 334 para 623, which stated that a question of construction is a question of law:

> … and where the question referred for arbitration is a question of construction, which is, generally speaking, a question of law …

'Arising Out Of An Award'

[157] The scope of the words 'arising out of an award' in s. 42 was first enunciated in *Majlis Amanah Rakyat v. Kausar Corporation*, citing *Universal Petroleum Co v. Handels und Transport GmbH* [1987] 1 WLR 1178, where Mohamad Ariff J, as he then was, said that "A question of law must arise out of an award and not out of the arbitration" (followed by *Rmarine Engineering (M) Sdn Bhd v. Bank Islam Malaysia Bhd* [2012] 7 CLJ 540; [2012] 10 MLJ 453, *Sanlaiman*, and *Tune Insurance*; see also *The Arbitration Act 2005 supra* at pp. 200-201).

The 18 'Questions Of Law Arising Out Of The Award'

[158] Even under AA 2005, the arbitrator is the master of the facts. There could not be any argument or debate on the findings of fact by the arbitrator or on the inferences drawn by the arbitrator from his findings of facts and from the evidence. Far East and KAOP must live with the findings of fact of the arbitrator. But that was not accepted by Far East and KAOP who referred, for example, the following questions of mixed fact and law to the High Court:

(i) Whether the arbitrator was correct in law in failing to conclude that (Majlis) nominee directors on the board of (KAOP) could validly bind (Majlis) in the stand they took in failing to object to the new allotment of shares?

(ii) Whether the arbitrator was correct in law in holding that the failure of (Far East and KAOP) to plead limitation deprived [Far East and KAOP] of its defense that (Majlis) objection on the allocation of 22,096,868 additional shares to (Far East) is an afterthought?

[159] The finding of the arbitrator that Majlis did not consent to the said allotment was a finding of fact. Far East and KAOP could not refer a question of law that was wholly reliant on a reversal of the fact found by the arbitrator. The finding of the arbitrator that limitation was not pleaded was also a finding of fact. Both questions were rightly rejected by the courts below.

Construction Of The Agreement

[160] Of the other nine questions referred to the High Court, eight pertained to the construction of the agreement.

[161] It was submitted that the agreement must be strictly construed. Yes, the agreement should be strictly construed "... as a whole, in order to ascertain the true meaning of its several clauses, and also, so far as practicable, to give effect to every part of it ... (to interpret) each clause ... as to bring them into harmony with the other clauses of the contract" (*Lucy Wong Nyuk King & Anor v. Hwang Mee Hiong* [2016] 4 CLJ 813; [2016] 3 MLJ 689 per Azahar Mohamed FCJ, delivering the judgment of the court;

for the canons of construction of an agreement, see *Hotel Anika* at [20] to [35]) "... in their grammatical and ordinary sense, unless that would lead to some absurdity, or some repugnance or inconsistence with the rest of the instrument, in which case the grammatical and ordinary sense may be modified, so as to avoid that absurdity and inconsistency, but no further (see *Grey v. Pearson* [1857] 6 HL Cas 61 per Lord Wensleydale); the ordinary meaning of a word is its meaning in its plain, ordinary and popular sense, unless the context points out some special and particular sense (see *Robertson v. French* [1803] 4 East 130). In the case of a word with both an ordinary and a specialised meaning, the popular meaning will prevail unless it is proved first that the parties intended to use the word in the specialised sense" (*Hotel Anika* at [27]).

[162] The introduction to the agreement read:

WHEREAS:

1. The State Government of Pahang Darul Makmur (hereinafter referred to as the "Pahang Government") had approved a piece of land with the estimated size of 4,481.3 hectares (or 11,073 acres) in Mukim Keratong/Rompin District of Rompin Pahang and specifically marked and shaded in RED in the plan annexed in Schedule I herein (hereinafter referred to as the "said Land") to Majlis to be developed. The documents for the approval of the alienation of the said Land to Majlis are annexed in Schedule I hereafter.

2. FEH through its fully owned company KAOP intends to develop the said Land pursuant to the terms of this agreement.

3. KAOP is a subsidiary company fully owned by FEH and its share capital on the 31st December 1990 together with its audited accounts report is as follows:

	M$
Share Capital	1,800,529
Capital Reserve	14,884,570
Replanting Reserve	53,000
Accumulated Profits	4,367,100
	21,105,199

Hereafter FEH intends to manage in order for KAOP to produce bonus shares from its capital reserve so that the structure of its share capital is as follows:

	M$
Share Capital	16,685,099
Re planting Reserve	53,000
Accumulated Profits	4,367,100
	21,105,199

4. This agreement is subject to completion and registration of the document of title of the said Land in the name of Majlis together and also its conditions stipulated in the said Document of Title and Majlis is responsible to ensure the issuance of the document of title of the said Land from the Authorities within one (1) year from the date of this Agreement and should it be unable to be issued within the said time, Majlis will be given additional time in which the duration of the time will have to be agreed upon by all the three parties herein.

5. All the three parties intend to develop the said Land with the oil palm plantation or other plantations that have commercial values (hereinafter referred to as the "said Project") according to the terms and conditions provided for in this Agreement.

6. The involvement of the three parties in the said Project in terms of capital, contributions, management and finance and matters arising are as provided herein below.

[163] The pertinent clauses of the agreement read:

CONDITIONS AND WARRANTIES

Clause 2.01 The Said Land

a. All the three parties in the agreement agree and accept that the value of the said Land is Ringgit: TWO THOUSAND FOUR HUNDRED AND THIRTY NINE AND SEVEN CENTS (M$2,439.07) only per acre, and the total price of the said land with an area of 4,481.3 hectares or 11,073 acres is Ringgit: TEN MILLION NINE HUNDRED TWENTY NINE THOUSAND NINE HUNDRED AND EIGHTY THREE (M$10,929,983-00) only and if the area of the said Land according to the Document of Title is more or less of the area designated therefore the total value of the said Land being provided for herein with the additional/ deductible rate according to the final area of the said Land.

b. KAOP will set up a Developer Company wholly owned by KAOP for the purpose of accepting the transfer of the said Land when document of title is issued and developing it according to this agreement; or

c. In the event that Majlis get the State Government of Pahang Darul Makmur, to approve the said Land directly to the Developer Company, and therefore Majlis has the following options:

i. Pay the related authorities all costs and registrations including the costs and land premium as well as all the other taxes being imposed relating to the said Land; or

ii. Allow KAOP to pay all costs and registrations including the costs and land premium as well as all the other taxes being imposed on the said Land directly to the authorities involved through the value of the said Land as stated in Clause 2.01(a) above.

d. If Majlis chooses to pay according to Clause 2.01(c)(ii) above, therefore the transfer and registration of issuance of new share to Majlis under Clause 2.02(a) in this agreement have to be based on the residual value of the said Land (which is the net total after the subtraction of all the payments under Clause 2.01(c)(ii) above) divided by Ringgit: One and thirty three cents (M$1-33) only per share.

Clause 2.02 KAOP Equity

a. When the said Land is transferred and registered under the name of the Developer Company or anyone or any receiver named by FEH, KAOP will allot new shares in the value of Ringgit: ONE AND THIRTY THREE CENT (M$1-33) only per share and base on the value of the said Land under clause 2.01(a) above therefore the share units allotted by KAOP for Majlis are 8,218,033 units.

$$\frac{\text{M\$10,929,983-00}}{\text{M\$1-33}} = 8{,}218{,}033 \text{ units}$$

and will be registered and transferred to Majlis as considerations for the said Land and the structure of shareholding within KAOP after the allotment of the new shares is as follows:

Names	Total Shares	Percentages
FEH	16,685,099	67.00
Majlis	8,218,033	33.00
Total	24,903,132	100.00
	=======	====

b. When the said Land is transferred to the Developer Company or anyone or any receiver named by FEH as an additional condition FEH hereby agrees and undertakes to offer to Majlis or anyone named a choice (option) to buy the shares of KAOP owned by FEH amounting to 3,984,501 units at the price of M$1-33 per unit that is the total price of M$5,299,386-33.

c. The said choice (option) is opened to Majlis or anyone named (hereinafter referred to as the "Option Holder") and binding on FEH for two (2) years starting and being effective from the date of the receipt of the approvals by the shareholders of FEH through Extraordinary Meeting, Foreign Investment Committee (FIC) relating to this joint venture and the Majlis Mesyuarat Kerajaan Negeri relating to the approval of transfer of the said Land to the Developer Company (whichever the later).

To determine the computation of one (1) year herein, it will be calculated as three hundred and sixty five (365) days from the date of the receipt of the approvals as mentioned in this Clause.

d. If the said choice (option) is enforced by the Option Holder, the equity of the shareholding in KAOP is as follows:

Names	**Total Shares**	**Percentages**
FEH	12,700,598	51%
Majlis	8,218,033	33%
Names Under Majlis	3,984,501	16%
Total	24,903,132	100.00
	=======	====

e. Majlis is hereby given an additional choice (option) to purchase 2,739,344 units of the share which is equivalent to eleven percent (11%) of FEH's shares with the price to be determined by all parties mentioned herein through negotiations; nevertheless the price to be agreed upon shall be based on the current evaluation of assets owned by KAOP and the Developer Company on the date the additional choice (option) is used.

f. The additional choice (option) binds FEH for three (3) years starting and effective from the fifth year after the approvals mentioned in clause 2.02(c) above are obtained.

g. When Majlis employs the additional choice (option) mentioned above, Majlis has to immediately release any kinds of assurance that has been given by FEH to any parties related to KAOP and the Developer Company.

h. FEH will only transfer and register the shares of KAOP in the name of the Option Holder based on the percentage of shares paid by the Option Holders to FEH.

i. All the new shares allotted by FEH in KAOP company are equivalent *"pari passu"* with the existing shares.

j. It is hereby agreed that all appointments by KAOP Board of Directors have to reflect the equity of the shareholding at all times. Any nomination for termination and discontinuation of directors have to be done by written notice and be sent to the KAOP Secretary and all the parties have to make sure that the nomination, termination and discontinuation of any directors are enforced in accordance with the equity of the shareholding of KAOP at all times.

k. KAOP Board of Directors from time to time if finds appropriate shall propose dividends declaration to its shareholders. If there are conflicting opinions, then the opinion proposed by the members of the board of directors that representing Majlis has to be accepted and it has to be KAOP Board of Directors' proposal basis to all the shareholders.

[164] Only ordinary words were used. Thus, "… plain and ordinary meaning should be adopted" (*Kee Keng Mow v. Setapak Garden Estate Ltd* [1975] 1 LNS 69; [1975] 2 MLJ 102 per Hashim Yeop A Sani J, as he then was). The "plain and ordinary meaning must be given" (*The Pacific Bank Bhd v. Kerajaan Negeri Sarawak* [2015] 3 CLJ 717; [2014] 6 MLJ 153 per Zainun Ali FCJ, delivering the judgment of the court).

[165] And when given its plain and ordinary meaning, the agreement was clear and unambiguous. The individual clauses, which the agreement described as "warranties and conditions", provided as follows. The value of the said land was agreed at RM10,929,983 (cl. 2.01(a)). KAOP would incorporate a wholly-owned subsidiary to develop the said land (cl. 2.01(b)). Majlis would pay all cost and premium for the alienation of the said land or allow KAOP to pay the same (cl. 2.01(c)). If KAOP should pay the cost and premium for the alienation of the said land, then the same would be deducted from the value of the said land (cl. 2.01(d)). With transfer of the said land to the subsidiary of KAOP, KAOP would allot 8,218,033 shares to Majlis; the 8,218,033 shares would represent 33% of the equity of KAOP (cl. 2.02(a)).

[166] Together, cls. 2.01(a) to 2.02(a) warranted that Majlis would be allotted 33% of the equity of KAOP, in exchange for the said land. But cls. 2.01(a) to 2.02(a) could not be performed by Far East and KAOP, well, even before the said land could be transferred to Madah Perkasa.

[167] When the agreement was executed in 1992, Far East held 16,685,099 shares. But in 1998, Far East was allotted 22,096,868 shares that enlarged its holding to 38,781,967 shares. By reason of its payment of the premium and quit rent, Far East secured a further 151,616 shares, while Majlis was allotted less 201,650 shares pursuant to cl. 2.01(d). Clause 2.01(a) warranted that KAOP would allot 8,218,033 shares, which would represent 33% equity of KAOP, to Majlis. But 8,218,033 shares would only represent 33% equity of KAOP only if the holding of Far East in KAOP were to remain at 16,685,099 shares. Clause 2.01(a) warranted that "the structure of shareholding ... would be Far East – 16,685,099 and Majlis – 8,218,033". Clause 2.01(a) further warranted that when the said land was transferred to the subsidiary of KAOP, "the structure of shareholding ... would be Far East – 67%, and Majlis – 33%". But those warranties on the share structure and the respective holdings could not be honoured, when Far East was allotted those 22,096,868 shares in 1998. For with that 1998 allotment which enlarged the shareholding of Far East to 38,781,967 shares (plus 151,616), the 8,218,033 (less 201,650) shares to be allotted to Majlis would only amount to about 17.5% equity of KAOP. The warranty of 33% equity could not be honoured, well, even before transfer of the said land to Madah Perkasa in 1999.

[168] But it was not just the warranty of 33% equity that could not be honoured. All other warranties in cls. 2.02(b), 2.02(d) and 2.02(e) could also not be honoured as a direct consequence of the allotment of 22,096,868 shares to Far East in 1998.

[169] Clause 2.01(b) warranted that Far East would "offer to Majlis ... an option to buy the shares of KAOP owned by FEH amounting to 3,984,501 units at the price of M$1-33 per unit that is the total price of M$5,299,386-33". Clause 2.02(c) warranted that the option to Majlis to purchase 3,984,501 shares from Far East would be "binding on FEH for two (2) years starting and being effective from the date of the receipt of the approvals by the shareholders of FEH through Extraordinary Meeting, Foreign Investment Committee (FIC) relating to this joint venture and the Majlis Mesyuarat Kerajaan Negeri relating to the approval of transfer of the said land to the developer company (whichever the later)". Clause 2.02(d) further warranted that "if the said choice (option) is enforced by the option holder, the equity of the shareholding in KAOP" would be "FEH – 12,700,598 (51%), Majlis – 8,218,033 (33%) and "Names Under Majlis" – 3,984,501 (16%)" out of the issued share capital of 24,903,132 shares. Clause 2.02(d) warranted that after exercise of the first option, the issued share capital of KAOP would remain at 24,903,132 shares.

[170] Clause 2.02(e) provided that Majlis had "an additional choice (option) to purchase 2,739,344 units of the share which is equivalent to eleven percent (11%) of FEH's shares with the price to be determined by all parties mentioned herein through negotiations; nevertheless the price to be agreed upon shall be based on the current evaluation of assets owned by KAOP and the developer company on the date the additional choice (option) is used".

[171] Together, cls. 2.02(b), 2.02(d) and 2.02(e) warranted that Majlis would be allotted 33% equity of KAOP and could purchase 27% equity of KAOP from Far East. Together, cls. 2.02(b), 2.02(d) and 2.02(e) provided that Majlis would hold 33% of the equity of KAOP and could hold up to 60% equity of KAOP. The agreement warranted that Majlis would be allotted 33% equity of KAOP. But after transfer of the said land to Madah Perkasa in 1999, Majlis was only allotted about 17.5% equity of KAOP. The correct number of shares was allotted to Majlis. But the correct number of shares allotted (8,218,033 less 201,650) gave not the agreed 33% equity to Majlis. Exercise of the options to purchase the stated number of shares would also not acquire for Majlis the stated 16% and 11% equity.

[172] It was argued that KAOP had the right to capitalise the loans. But it was conveniently forgotten that KAOP was not at liberty, not after execution of the agreement, to capitalise whatever loans. KAOP and Far East warranted that the issued share capital of KAOP would stay put at 24,903,132 shares. The issued share capital of KAOP would not stay put at 24,903,132 shares if loans were capitalised. It was argued that the agreement

did not expressly state that KAOP could not capitalise loans. But any capitalisation of loans would offend the warranty on the issued share capital of KAOP. Capitalisation of loans was implicitly not permitted by the agreement. It was argued that Majlis consented to the capitalisation and allotment in 1998. But the finding of fact of the arbitrator was that there was no such consent from Majlis. Given that that was the finding of fact, we agree with the arbitrator that the 1998 allotment was in blatant breach and in total disregard of cls. 2.02(a), 2.02(b), 2012(d) and 2.02(e).

[173] Clearly, exercise of the options to purchase the stated number of shares would not acquire for Majlis the said 16% and 11%. For even before the said land could be transferred to Madah Perkasa and therefore even before Majlis could exercise the options, Far East and KAOP had upended cls. 2.02(b), 2.02(d), and 2.02(e), and rendered those clauses ineffectual to give control to Majlis. It was argued that the options were not exercised within time. But with respect, we fail to see how Majlis could exercise the options in accordance with the agreed terms and time. For once the loans were capitalised in 1998, Majlis could no longer acquire the said 16% and 11% from Far East. Once the loans were capitalised in 1998, Far East could no longer honour sale of 16% and 11% to Majlis. Given that the options could not be honoured, it was most unfair to argue that the options were not exercised within time. In any event, it was futile to argue against the finding of fact of the arbitrator that the options were exercised within time.

[174] There was no error of law by the arbitrator in his construction of the agreement. The 1998 allotment contravened cls. 2.02(a), 2.02(d) and 2.02(e). The failure to sell the said 16% and 11% breached cls. 2.02(b), 2.02(c), 2.02(d), and 2.02(e). To enforce the agreement, the arbitrator was correct in law to strike down the 1998 allotment. That answers the first of the 'questions of law arising out the award' put to the High Court.

Questions Put To The High Court

[175] As for the rest of the 'questions of law arising out the award' put to the High Court, question 2 was not a discrete question of law. Questions 3 and 4 were not questions that could substantially affect the rights of one or more of the parties. As for question 5, we need only to repeat that there was no error of law by the arbitrator in the construction of the agreement. Questions 6-13 and 15 which sought to challenge the finding of fact that the options were exercised in time could not be entertained. And question 14, besides it being a question of fact, could not substantially affect the rights of one or more of the parties, as the difference between the net asset value and the current asset value, about RM0.17 per share, was relatively insubstantial. Both courts below were right to conclude that the aforesaid 'questions of law arising out of the award' did not merit intervention under s. 42.

The Award Of Damages

[176] With cancellation of the 1998 allotment, Far East was put back to the share structure of 16,685,099 (Far East) and 8,218,033 (Majlis). Or rather, Far East was put back to the share structure of 16,685,099 + 151,616 (Far East) and 8,218,033 less 201,650 (Majlis). Cancellation of the 1998 allotment put the total issued shares capital of KAOP back to 24,853,098 shares.

[177] Section 56(1)(c) of the Companies Act 1965 (since repealed by the Companies Act 2016) provided that a company may "pay dividends in proportion to the amount paid up on each share where a larger amount is paid up on some shares than on others". KAOP could only pay dividends in proportion to the amount of its issued share capital. But KAOP would have paid dividends in proportion to the then issued share capital of Far East – 38,933,583 (16,685,099 + 22,096,868 +151,616) and Majlis – 8,016,383 (8,218,033 less 201,650). But with cancellation of the 1998 allotment, only the dividends paid in proportion to 24,853,098 shares would have been validly paid. That was not discerned by the arbitrator who only perceived that dividends were not paid to Majlis in accordance with its rightful equity. The arbitrator attempted to put that right.

[178] But in his attempt to put things right, the arbitrator failed to appreciate that all dividends were paid from profits of KAOP (see s. 365 of the Companies Act 1965). With cancellation of the 1998 allotment, Far East could not retain the dividends paid to 22,096,868 shares (1998 allotment). In *Re Cleveland Trust plc*, Cleveland Trust plc (Cleveland) had a wholly-owned subsidiary (Gunnergate) which in turn had a wholly-owned subsidiary (McInnes). McInnes, as a result of its sale of property on which realised a substantial capital profit, declared a dividend which was ultimately passed on to Cleveland. As a result of the receipt of the money, Cleveland made a bonus issue of fully paid shares to be capitalised out of its profit and loss account. McInnes was not empowered to use its capital surplus from the sale of assets to declare a dividend. It was claimed that since McInnes had no capacity to so declare a dividend, Gunnergate was liable as a constructive trustee to repay to McInnes the dividend which it had received and Cleveland in turn was liable to account to Gunnergate. On the consequences of an *ultra vires* dividend payment, Scott J referred to *Precision Dippings Ltd v. Precision Dippings Marketing Ltd* [1985] BCLC 385, where Dillon LJ said:

> The payment of the dividend of £60,000 was therefore an *ultra vires* act by the company, just as if it had been paid out of capital or in any other circumstances in which under any of the other provisions of s. 39 and the following sections there were not profits available for dividend. In those circumstances, can Marketing have any defence to the company's claim for repayment of the £60,000 with interest?

I would put the position quite shortly. The payment of the £60,000 dividend to Marketing was an *ultra vires* act on the part of the company. Marketing when it received the money had notice of the facts and was a volunteer in the sense that it did not give valuable consideration for the money. Marketing accordingly held the £60,000 as a constructive trustee for the company: see *Rolled Steel Products (Holdings) Ltd v. British Steel Corp* [1985] 3 All ER 52 at 87-88, 91, [1984] BCLC 466 at 509-510, 514 per Slade and Browne-Wilkinson LJJ.

[179] Scott J held that McInnes lacked capacity to pay a dividend out of capital surpluses arising out of the sale of its assets, and that Gunnergate, to the extent that the dividend was unauthorised, was a constructive trustee to hand back the dividend.

[180] The arbitrator should order Far East to return all *ultra vires* dividends to KAOP. But the arbitrator did not order Far East to return the *ultra vires* dividends to KAOP. Instead, the arbitrator ordered Far East to pay damages to Majlis. The arbitrator held that Majlis lost total dividends of RM97,692,957 as a direct consequence of failure by Far East to transfer the said 16% and 11% to Majlis. The arbitrator ordered Far East to pay RM97,692,957 to Majlis as damages.

Computation Of The Ultra Dividends

[181] All dividends would have been paid in proportion to the then issued share capital of Far East – 38,933,583 shares (16,685,099 + 22,096,868 + 151,616) and Majlis – 8,016,383 shares. Our computation is that Majlis would have received 17.074% of the dividends paid in proportion to the then issued share capital of 46,949,966 shares (38,933,583 + 8,016,383). The arbitrator held that Majlis had 17.1% of the equity (see order eight of the award) and that Majlis lost dividends of RM97,692,957 as a direct consequence of failure by Far East to transfer the said 16% and 11% equity to Majlis. In other words, according to the arbitrator, Majlis would have received additional dividends of RM97,692,957, if Majlis had 32.39% (see order two of the award) and 27% of the equity. The arbitrator "re-allocated" the total dividends paid in proportion to 46,949,966 shares, on the basis Majlis should have had 59.39% of the equity. Also according to the arbitrator, RM97,692,957 was the shortfall between what Majlis would have received in proportion to 59.39% equity and what Majlis actually received in proportion to 17.1% equity. That is the same as to say that Majlis would have received additional dividends of RM97,692,957, if Majlis had that additional 42.27% (59.39% less 17.1%) of the then issued share capital of 46,949,966 shares.

[182] Since RM97,692,957 was proportionate to 42.27% of 46,949,966 shares, then RM97,692,957 would have been the total dividends paid in proportion to 19,834,952 shares (46,949,966 X 42.27%). One single share would have received a total dividend of RM4.774 (RM97,692,957 ÷ 19,834,952). 22,096,868 shares (1998 allotment) would have received a total

dividend of RM105,490,448 (4.774 X 22,096,868). Far East would have received *ultra vires* dividends of RM105,490,448. The arbitrator should order Far East to give back RM105,490,448 to KAOP. But instead, the arbitrator ordered Far East to pay RM77,808,207.80 (RM97,692,957 less RM19,884,749.20) to Majlis as damages. By that latter devise, the *ultra vires* dividends that belonged to KAOP were "re-allocated" to Far East and Majlis.

Computation Of The Intra Vires Dividends

[183] Cancellation of the 1998 allotment and return of the *ultra vires* dividends should align it to the position where dividends would not have been paid to any of the 22,096,868 shares (1998 allotment). That should resolve all issue that pertained to the 1998 allotment. However, we still need to resolve the division of the legitimate dividends paid to the 24,853,098 shares. The legitimate dividends would have been paid to Far East – 67.61% and Majlis – 32.39% (see order (2) of the award), and not Far East – 40.61% and Majlis – 59.39%. Being entitled to only 40.61% of 24,853,098 shares, Far East should give back all dividends received, beyond its 40.61%, to Majlis. Majlis was entitled to 59.39% but would have been paid only 32.39% of the dividends paid to 24,853,098 shares. Majlis should be paid a further 27% of the dividends paid to 24,853,098 shares. 27% of 24,853,098 shares equates to 6,710,336 shares. One single share would have received a total dividend of RM4.774. 6,710,336 shares would have received RM32,035,144.10 (4.774 X 6,710,336). Far East received that sum. Far East should restore that RM32,035,144.10 to Majlis.

Set-Off

[184] Conversely, Majlis should be ordered to pay the consideration payable on exercise of the options. A set-off would not offend s. 67(1) of the Companies Act 1965, as the dividends paid in proportion to those 6,723,845 shares were not *ultra vires* dividends that should be returned to KAOP, but were dividends that should have been received by Majlis.

Our Answers To Leave Questions

[185] In our summary of the law, we indicated that our answers to leave questions 1 and 2 in Civil Appeals 02-19-04-2016 and 02-20-04-2016 would be, now are, the following:

(a) Both the distinction between a general reference and a specific reference, and the 'rule' that there could not be a reference to court over an error of law under a specific reference to the arbitrator, are no longer relevant or applicable under AA 2005. We must however add that leave questions 1 and 2 were not questions of law arising out of the award. 'General reference' and 'specific reference' were raised by the Court of Appeal below.

(b) Under s. 42, the only test is whether there is a question of law arising from the award that substantially affects one or more of the parties; 'illegality', 'manifestly unlawful and unconscionable', 'perverse', 'patent injustice' are not applicable tests.

[186] In relation to the leave questions in Civil Appeal 02-21-04-2016, we observe that s. 21 of AA 1952, which provided that "A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt", gave latitude to an arbitrator to award interest. Under AA 1952, an arbitrator was not constrained to award interest only from the date of the award. But under AA 2005, an arbitrator has not that room to manoeuvre. Section 33(6) of AA 2005 provides:

> (6) Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:
>
> (a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and
>
> (b) determine the rate of interest.

[187] Unless otherwise provided in the arbitration agreement, an arbitrator could only award post-award interest. AA 2005 does not contemplate the award of pre-award interest, unless so provided in the arbitration agreement. There was no indication that pre-award interest was provided in the arbitration agreement. Pre-award interest could not be awarded. Post-award interest may be granted. But since post-award interest was not pleaded, it would not seem fair that the discretion to award interest should be exercised in favour of post-award interest.

Orders

[188] For the above reasons, we unanimously dismiss all three appeals with costs and upon the following terms. We affirm the cancellation of the 1998 allotment. However, we need to vary the award. We do so on the basis of the available data found by the arbitrator (see *Fence Gate Limited v. NEL Construction Limited* (2001) 82 Con LR 41 at [93]), by the following orders:

(a) the award of damages is set aside;

(b) Far East to return RM105,490,448 to KAOP within one month from the date of this judgment; the loan of RM22,096,868 shall be deemed as part return;

(c) Far East to pay RM32,035,144.10 to Majlis;

(d) Majlis to pay RM19,884,749.20 to Far East;

(e) The sum payable under order (d) to be set-off against the sum payable under order (c); in the result, Far East to pay RM12,150,394.90 to Majlis within one month from date of this order;

(f) Far East to transfer 6,723,845 KAOP shares to Majlis, together with delivery of the pertinent share certificates, within one month from the date of this order; in default, the secretary of KAOP is to register Majlis as holder of the said 6,723,845 KAOP shares and issue replacement share certificates.

[189] In the course of our discussion of the law, we mentioned local decisions that might be still under appeal. Prudence dictates that we make clear that we only cited those decisions for completeness in our discussion of the law, and not because we agree or disagree with any one of them.